(28,524, 28,525, 28,526, 28,527, 28,528)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 569.

MICHAEL HEITLER, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

No. 570.

NATHANIEL PERLMAN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

No. 571.

MANDEL GREENBERG, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

No. 572.

FRANK McCANN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

No. 573.

GEORGE F. QUINN, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1922.

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States court-room, in the city of Chicago, in said district and division, before the Honorable Evan A. Evans, circuit judge of the United States for the northern district of Illinois, on Tuesday, the seventeenth day of May, in the year of our Lord one thousand nine hundred and twenty-one, being one of the days of the regular May term of said court, begun Monday, the second day of *Monday,* and of our Independence the 146th year.

Present:

Honorable Evan A. Evans, Circuit Judge.
John J. Bradley, U. S. Marshal.
John H. R. Jamar, Clerk.

2 And afterwards, to wit, on the 18th day of December, 1920, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

3 In the United States District Court, Northern District of Illinois, Eastern Division, Saturday, December 18, A. D. 1920.

Present: Honorable Kenesaw M. Landis, District Judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the grand jury this day and return in open court an indictment against Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Edward Smale, George Hans, Eugene McCaffrey, Morris H. Gindich, William A. Gorman, William G. Knebelkamp, Othe R. Wathen, Timothy Judge, Joseph P. Galivn, Frank O'Hara, Henry P. Wissing, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William P. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block and Max Wagman, the defendants herein, whereupon on motion of the United States Attorney it is ordered by the court that said indictment be filed and the cause placed upon the dockets of this court.

4 In the United States District Court, Northern District of Illinois, Eastern Division.

No. 7465.

THE UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, et al.

Be It Remembered that on to-wit: the eighteenth day of December, 1920, there was filed in the office of the Clerk of said Court in said entitled cause, a certain Indictment in words and figures following to-wit:

5 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

In the District Court of the United States of America for the Northern District of Illinois, Eastern Division, of the November Term, in the Year 1920.

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois at the November Term of said court in the year 1920, and inquiring for said division and district, upon their oath present, that Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Edward Smale, George Hans, Eugene McCaffrey, Morris H. Gindich, William A. Gorman, William G. Knebelkamp, Othe H. Wathen, Timothy Judge, Joseph P. Galvin, Frank O'Hara, Henry P. Wissing, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block, and Max Wagman, each late of the City of Chicago, in said Eastern Division of said Northern District of Illinois, hereinafter called defendants, throughout the period of time from August 1, 1920, to November 1, 1920, at Chicago aforesaid, in said division and district, unlawfully and feloniously did conspire, combine, confederate and agree together, and with divers other persons to said grand jurors unknown, to commit divers offenses against the United States, to wit, the offense of purchasing from the Old Grand-Dad Distillery Company, of Louisville, Kentucky, a large quantity, to wit, one thousand cases, containing three thousand proof gallons, of distilled spirits and intoxicating liquor, to wit, whiskey, in cases bearing the serial number 270,013 to 271,012, both inclusive,
6 and the name "Old Grand Dad Whiskey," and in bottles bearing the name and label "Old Grand Dad Whiskey,"

without first obtaining a permit from the Commissioner of Internal Revenue so to do; the offense of transporting said distilled spirits and intoxicating liquor from the warehouse of said Old Grand-Dad Distillery Company, at Hobbs, Kentucky, to Chicago aforesaid, by way of Peoria, Illinois, in said division and district, without first obtaining from said Commissioner of Internal Revenue a permit so to do, and not as authorized by the provisions of the Act of Congress of October 28, 1919, entitled "An Act To prohibit intoxicating beverages, and to regulate the manufacture, production, use and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries," that is to say, not for nonbeverage purposes; the offense of selling at Chicago aforesaid, in said division and district for beverage purposes, said distilled spirits and intoxicating liquor; and the offense of possessing said distilled spirits and intoxicating liquor, at Chicago aforesaid, in said division and district otherwise than as authorized by said Act of Congress, that is to say, for the purpose and with the intent on their part of selling the same for beverage purposes.

Overt Acts.

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that certain of said defendants, at the several times and places hereinafter mentioned in connection with their names, did do certain acts to effect the object of said unlawful and felonious conspiracy, combination, confederation and agreement, that is to say:

1. Said Michael Heitler, Nathaniel Perlman and Mandel Greenberg, on to wit, September 25, 1920, at Chicago aforesaid, collected a large sum of money, to wit, $135,000.00 from said James
7 O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block and Max Wagman.

2. Said Morris H. Gindich, on September 30, 1920, at Peoria, Illinois, procured the reconsignment of Rock Island Car No. 155,364, containing said distilled spirits and intoxicating liquor from Peoria aforesaid to Chicago aforesaid.

3. Said Othe H. Wathen and William F. Knebelkamp, on, to wit, September 25, 1920, at Hobbs, Kentucky, aforesaid, caused said distilled spirits and intoxicating liquor to be loaded in said Rock Island Car No. 155,364.

4. Said William A. Gorman, on October 1, 1920, at Chicago aforesaid, told one G. F. Koeller, who then was the station agent for the Rock Island Railroad, at Gresham Station, that said Morris H. Gindich was the Max Berkson named as consignee in the bill of lad-

ing covering said Rock Island Car No. 155,364 containing said distilled spirits and intoxicating liquor.

5. Said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Edward Smale, George Hans, Eugene McCaffrey, Morris H. Gindich, William A. Gorman, Timothy Judge, Joseph P. Galvin, Frank O'Hara, Henry P. Wissing, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block, and Max Wagman, on October 1, 1920, at said Gresham Station, in Chicago aforesaid, unloaded said distilled spirits and intoxicating liquor from said Rock Island Car No. 155,364.

Conclusion.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that said defendants, throughout the period of time, at the place, and in manner and form, aforesaid, unlawfully and feloniously did conspire to commit offenses against the United
8 States, and some of said defendants did do acts to effect the object of the conspiracy: Against the peace and dignity of the United States, and contrary to the form of the statute of the same in case made and provided.

CHARLES F. CLYNE,
United States Attorney.

9 [Endorsed:] Form No. 195. No. 7465. United States District Court, Northern District of Illinois, Eastern Division. The United States of America, vs. Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Edward Smale, George Hans, Eugene McCaffrey, Morris H. Gindich, William A. Gorman, William G. Knebelkamp, Othe R. Wathen, Timothy Judge, Joseph P. Galvin, Frank O'Hara, Henry P. Wissing, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block and Max Wagman. Indictment. Vio. Sec. 37, C. C. Conspiracy to violate Act of October 28, 1919, Secs. 3, 6 and 33; Title II. National Prohibition Act. A true bill, A. J. Murphy, Foreman. Filed in open court this 18th day of Dec., A. D. 1920. John H. R. Jamar, Clerk.

10 And afterwards, to wit, on the 27th day of December, 1920, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

11 In the United States District Court, Northern District of Illinois, Eastern Division, Monday, December 27, A. D. 1920.

Present: Honorable Kenesaw M. Landis, district judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

This cause coming on to be heard on the demurrers of Michael Heitler, Nathaniel Perlman, Mandel Greenberg, John H. McGovern, William E. McGovern, and the oral demurrer of George Hans, to the indictment filed herein against them, come the parties by their attorneys and the defendants in their own proper persons, and the court having heard the arguments of counsel and being fully advised in the premises, overrules said demurrers, whereupon said defendants being arraigned upon the indictment filed herein against them, each defendant pleads not guilty thereto. And thereupon the Defendants John H. McGovern and William E. McGovern, by their attorneys, enter their motion to quash the indictment filed herein against them, and the court having heard the arguments of counsel and being now fully advised in the premises, it is ordered by the court that said motion be and it hereby is overruled: to which order of the court said defendants by their attorneys duly except.

12 And afterwards, to wit, on the 27th day of December, 1920, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

13 In the United States District Court, Northern District of Illinois, Eastern Division, Monday, December 27, A. D. 1920.

Present: Honorable Kenesaw M. Landis, district judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Comes the United States by Charles F. Clyne, Esq., United States Attorney, come also the defendants herein in their own proper persons, and by leave of court first had and obtained, Eugene McCaf-

frey, one of the defendants herein, withdraws the demurrer heretofore filed herein by him, and being now arraigned upon the indictment filed herein against him, pleads not guilty thereto. And thereupon, it is ordered by the Court that the Defendants William G. Knebelkamp and Othe H. Wathan enter pleas of not guilty at the trial of this cause.

14 And afterwards, to wit, on the 27th day of December, 1920, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to wit:

15 In the United States District Court, Northern District of Illinois, Eastern Division, Monday, December 27, A. D. 1920.

Present: Honorable Kenesaw M. Landis, district judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Comes the United States by Charles F. Clyne, Esq., United States Attorney, come also the defendants Edward Smale, Morris H. Gindich, William A. Gorman, Timothy Judge, Joseph P. Galvin, Frank O'Hara, Henry P. Wissing, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, George F. Callaghan, Edward P. Graham, Samuel J. Cohn, Joseph Marner, Harry R. Block and Max Wagman, in their own proper persons and said defendants being arraigned upon the indictment filed herein against them each defendant pleads not guilty thereto.

16 And afterwards, to wit, on the 15th day of February, 1921, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

17 In the United States District Court, Northern District of Illinois, Eastern Division, Tuesday, February 15, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Comes the United States by United States Attorney, come also Othe H. Wathen and William P. Knebelkamp, two of the defendants herein, and said defendants being arraigned upon the indictment filed herein against them, each defendant pleads not guilty thereto.

18 And afterwards, to wit, on the 15th day of February, 1921, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

19 In the United States District Court, Northern District of Illinois, Eastern Division, Tuesday, February 15, A. D. 1921.

Present: Honorable Evan A. Evans, *district* judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and on motion of the United States by Charles F. Clyne, United States Attorney, and for good cause to the court shown, it is ordered by the court that this cause be and it hereby is dismissed as to Eugene McCaffrey, Frank O'Hara, Henry P. Wissing, William E. McGovern, Samuel J. Cohen and Harry R. Block.

20 And afterwards, to wit, on the 17th day of February, 1921, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

21 In the United States District Court, Northern District of Illinois, Eastern Division, Thursday, February 17, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and the defendants, Edward Smale, Morris H. Gindich, William A. Gorman, Timothy Judge, Joseph P. Garvin, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, George F. Callaghan, Edward P. Graham, Joseph Marner, Max Wagman, Michael Heitler, Nathaniel Perlman, Mandel Greenberg, John H. McGovern, George Hans, William G. Knebelkamp, and Othe H. Wathen, in their own proper persons and each of the said defendants having heretofore interposed a plea of not guilty to the indictment filed herein against him and this cause now coming on for trial, for their defense put themselves upon the country, whereupon comes a jury of good and lawful men, to wit: Elias Erb, Joseph Cantore, George Carnie, Frederick Corbett, Albert Albee, E. C. Austin, Charles Miller, Ed. C. Younker, S. L. Frank, J. R. Schmidt, William Guenther, and Charles Mack, who are duly elected, empaneled and sworn herein a true verdict to render according to the law and the evidence, and the trial of this cause proceeds, and at the close of the opening statements of the government, on motion of said defendants by their attorney, it is ordered by the court that all witnesses be excluded from the court room. It is further ordered by the court that all objections and exceptions made during the trial of this cause, cover all of the defendants herein. During the examination of witnesses, the usual hour of adjournment having arrived, it is ordered by the court that the further trial of this cause be continued until tomorrow morning at ten o'clock.

21½ And afterwards, to wit, on the 24th day of February, 1921, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

21½a In the United States District Court, Northern District of Illinois, Eastern Division, Thursday, February 24, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and the defendants in their own proper persons, and for good cause to the court appearing it is ordered by the court that this cause be and it hereby is dismissed as to Joseph P. Galvin, Bryan Kane, Joseph Marner, Max Wagman, Edward Smale, William G. Knebelkamp, and Othe H. Wathen.

22 And afterwards, to wit, on the 25th day of February, 1921, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

23 In the United States District Court, Northern District of Illinois, Eastern Division, Friday, February 25, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Comes the United States by United States Attorney, and for good cause to the court shown, it is ordered by the court that this cause be and it hereby is dismissed as to Patrick Simmons.

24 And afterwards, to wit, on the 25th day of February, 1921, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

25 In the United States District Court, Northern District of Illinois, Eastern Division, Friday, February 25, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and the defendants Timothy Judge, Thomas McLaughlin and Edward P. Graham in their own proper persons, and on motion of said defendants, the court having heard the arguments of counsel and being fully advised in the premises, it is ordered by the court that this cause be and it hereby is dismissed as to Timothy Judge, Thomas McLaughlin and Edward P. Graham.

26 And afterwards, to wit, on the fourth day of March, 1921, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

27 In the United States District Court, Northern District of Illinois, Eastern Division, Friday, March 4, A. D. 1921.

Present: Honorable Evan A. Evans, district judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

On motion of Charles F. Clyne, United States Attorney, it is ordered by the court that this cause be and it hereby is dismissed as to Morris H. Gindich.

28 And on, to wit, the fourth day of March, 1921, came the Defendants by their attorneys, and filed in the Clerk's office of said Court certain Motions in words and figures following, to wit:

29 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division, of the February Term, in the Year A. D. 1921.

No. 7465.

UNITED STATES OF AMERICA

v.

MICHAEL HEITLER et al.

Motion.

Now comes Michael Heitler, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Michael Heitler, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act com-
30 mitted or done to effect the object of any such conspiracy or combination as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trust-worthy evidence but is tainted with self-contradictory statements or expressed malice or both.

8. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as

is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell or possess for sale intoxicating liquor. to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to possess for sale intoxicating liquor, to wit, whiskey. at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which had as an object the purchasing of whiskey without a permit; the transporting of the said whiskey from Hobbs, Kentucky to Chi-
31 cago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Michael Heitler et al.

(Endorsed:) Filed Mar. 4, 1921. John H. R. Jamar, Clerk.

32 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division, of the February Term, in the Year A. D. 1921.

No. 7465.

UNITED STATES OF AMERICA

v.

NATHANIEL PERLMAN et al.

Motion.

Now comes Nathaniel Perlman, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Nathaniel Perlman, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act com-
33 mitted or done to effect the object of any such conspiracy or combination as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trust-worthy evidence but is tainted with self-contradictory statements or expressed malice or both.

8. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy, as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell or possess for sale intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to possess for sale intoxicating liquor, to wit, whiskey, at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which had
34 as an object the purchasing of whiskey without a permit; the transporting of the said whiskey from Hobbs, Kentucky to Chicago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Nathaniel Perlman et al.

(Endorsed:) Filed Mar. 4, 1921. John H. R. Jamar, Clerk.

35 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division, of the February Term, in the Year A. D. 1921.

No. 7465.

UNITED STATES OF AMERICA

v.

MANDEL GREENBERG et al.

Motion.

Now comes Mandel Greenberg, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Mandel Greenberg, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act com-
36 mitted or done to effect the object of any such conspiracy or combination as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trust-worthy evidence but is tainted with self-contradictory statements or expressed malice or both.

8. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy, as is charged in the indictment, in that there is no evidence that the con-

spiracy, if any, was one to transport, sell or possess for sale intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to possess for sale intoxicating liquor, to wit, whiskey, at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which had
37 as an object the purchasing of whiskey without a permit; the transporting of the said whiskey from Hobbs, Kentucky to Chicago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Mandel Greenberg et al.

(Endorsed:) Filed Mar. 4, 1921. John H. R. Jamar, Clerk.

38 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division, of the February Term, in the Year A. D. 1921.

No. 7465.

UNITED STATES OF AMERICA

v.

FRANK McCANN et al.

Motion.

Now comes Frank McCann, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Frank McCann, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act com-
39 mitted or done to effect the object of any such conspiracy or combination as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trust-worthy evidence but is tainted with self-contradictory statements or expressed malice or both.

8. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell or possess for sale intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to possess for sale intoxicating liquor, to wit, whiskey, at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which
40 had as an object the purchasing of whiskey without a permit; the transporting of the said whiskey from Hobbs, Kentucky to Chicago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Frank McCann et al.

(Endorsed:) Filed Mar. 4, 1921. John H. R. Jamar. Clerk.

41 And afterwards, to wit, on the fourth day of March being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

42 In the United States District Court, Northern District of Illinois, Eastern Division, Friday, March 4, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

No. 7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys, come also the defendants, John H. McGovern, George F. Quinn, Wm. J. Trudel, George F. Callaghan, Nicholas Ambrosi, William A. Gorman, James O'Leary, Frank McCann, George Hans, Mandel Greenberg, Nathanial Perlman and Michael Heitler, in their own proper persons, and each of said defendants by his attorney enters his motion that he be dismissed as a defendant in this cause, and the court having heard the arguments of counsel and being fully advised in the premises, overrules and denies said motion.

43 And afterwards, to wit, on the eighth day of March, 1921, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit, Judge, appears the following entry, to wit:

44 In the United States District Court, Northern District of Illinois, Eastern Division, Tuesday, March 8, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

This being the day and hour to which the further trial of this cause was on yesterday continued, come again the parties by their attorneys and the defendants in their own proper persons, come also

the jury who were duly elected, empaneled and sworn herein as aforesaid, and render their verdict and upon their oath do say: "We, the jury, find the Defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George F. Quinn, William J. Trudel and Frank McCann, guilty, and we find the Defendants George F. Hans, William Gorman, James O'Leary, Nicholas Ambrosi, John McGovern, and George F. Callahan, not guilty. Whereupon it is ordered by the Court that the said Defendants George F. Hans, William Gorman, James O'Leary, Nicholas Ambrosi, John McGovern, and George F. Callaghan, go hence without day.

Thereupon each of said Defendants Michael Heitler, Nathaniel Pearlman, Mandel Greenberg, George F. Quinn, William J. Trudel and Frank McCann, by his attorney enters his motion for a new trial, and this cause is continued two weeks for hearing on said motion.

45 And on, to wit, the thirtieth day of March, 1921, came the Defendants by their attorneys and filed in the Clerk's office of said Court certain Motions for a new Trial in words and figures following, to wit:

46 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

v.

MICHAEL HEITLER et al.

Motion for a New Trial.

Now comes the defendant, Michael Heitler, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that this defendant was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that this defendant had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize this defendant as a "Shylock."

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

5. The court erred in sustaining the objection of the gov-
47 ernment to questions asked the witness Greengaard by this defendant relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicating liquor.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by the witness McCann that the witnesses Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy and his associates or the defendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only so far as the connection or story of the said individuals tended to establish the guilt or innocence of the defendants.

11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government wit-
48 nesses were the conspirators and not this defendant and the other defendants.

12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to support the contentions of the government without, at the same time, sufficiently placing before the jury the evidence which tended to support the contentions of this defendant.

13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant a continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were known to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

49 19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition Law, unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whisky to be secured at Hobbs, Kentucky and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, to-wit, whisky, for beverage purposes as distinguished from any other purpose or purposes.

23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whisky without a permit in manner and form as is charged in the indictment; to transport the said whisky for beverage purposes in manner and form as is
50 charged in the indictment; to possess the said whisky for sale for beverage purposes in manner and form as is charged in the indictment; and to sell the said whisky for beverage purposes in manner and form as is charged in the indictment.

24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whisky from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment; or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Michael Heitler.

(Endorsed:) Filed Mar. 30, 1921. John H. R. Jamar, Clerk.

51 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

v.

NATHANIEL PERLMAN et al.

Motion for a New Trial.

Now comes the defendant, Nathaniel Perlman, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that the defendant, Michael Heitler, was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that the defendant, Michael Heitler, had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize the defendant, Michael Heitler, as a "Shylock," thereby permitting the prosecuting attorney to arouse passion and prejudice in the minds of the jury against this defendant because of his race.

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

52 5. The court erred in sustaining the objection of the government to questions asked the witness Greengaard by this defendant relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicatign liquor.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by the witness McCann that the witnesses Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy and his associates or the defendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only so far as the connection of story of the said individuals tended to establish the guilt or innocence of the defendants.

53 11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government witnesses were the conspirators and not this defendant and the other defendants.

12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to sup-

port the contentions of the government without, at the same time, sufficiently placing before the jury the evidence which tended to support the contentions of this defendant.

13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant a continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were known to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

54 19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition Law, unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whisky to be secured at Hobbs, Kentucky, and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, to-wit, whisky, for beverage purposes as distinguished from any other purpose or purposes.

23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at

any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whisky without a permit in manner and form as is charged in the indictment; to transport the said whisky for beverage purposes in manner and form as is
55 charged in the indictment; to possess the said whisky for sale for beverage purposes in manner and form as is charged in the indictment; and to sell the said whisky for beverage purposes in manner and form as is charged in the indictment.

24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whisky from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment; or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Nathaniel Perlman.

(Endorsed:) Filed Mar. 30-1921. John H. R. Jamar, Clerk.

56 [Endorsed:] No. 7465. District Court of the United States of America, Northern District of Illinois, Eastern Division. United States of America v. Nathaniel Perlman, et al. Motion for a New Trial. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building Chicago. Telephone Randolph 2929.

57 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

v.

MANDEL GREENBERG et al.

Motion for a New Trial.

Now comes the defendant, Mandel Greenberg, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that the defendant, Michael Heitler, was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that the defendant, Michael Heitler, had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize the defendant, Michael Heitler, as a "Shylock," thereby permitting the prosecuting attorney to arouse passion and prejudice in the minds of the jury against this defendant because of his race.

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

5. The court erred in sustaining the objection of the government to questions asked the witness Greengaard by this defendant
58 relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicating liquor.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by the witness McCann that the witnesses Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed

to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy and his associates or the defendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only so far as the connection or story of the said individuals tended to establish the guilt or innocence of the defendants.

59 11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government witnesses were the conspirators and not this defendant and the other defendants.

12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to support the contentions of the government without, at the same time, sufficiently placing before the jury the evidence which tended to support the contentions of this defendant.

13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant a continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were known to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

60 19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition

Law, unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whisky to be secured at Hobbs, Kentucky and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, to-wit, whisky, for beverage purposes as distinguished from any other purpose or purposes.

23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whisky without a permit in manner and form as is charged in the indictment; to transport the said whisky for beverage purposes in manner and form as is
61 charged in the indictment; to possess the said whisky for sale for beverage purposes in manner and form as is charged in the indictment; and to sell the said whisky for beverage purposes in manner and form as is charged in the indictment.

24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whisky from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment; or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Mandel Greenberg.

(Endorsed:) Filed Mar. 30, 1921. John H. R. Jamar, Clerk.

62 [Endorsed:] No. 7465. District Court of the United States of America, Northern District of Illinois, Eastern Division. United States of America v. Mandel Greenberg et al. Motion for a new trial. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago. Telephone Randolph 2929.

63 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

v.

FRANK McCANN et al.

Motion for a New Trial.

Now comes the defendant, Frank McCann, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that the defendant Michael Heitler was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that the defendant Michael Heitler had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize the defendant, Michael Heitler, as a "Shylock," thereby permitting the prosecuting attorney to arouse passion and prejudice in the minds of the jury against this defendant.

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

5. The court erred in sustaining the objection of the gov-
64 ernment to questions asked the witness Greengaard by this defendant relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicating liquors.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by his testimony that the witnesses, Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy and his associates or the defendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only so far as the connection or story of the said individuals tended to establish the guilt or innocence of the defendants.

11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government witnesses were the conspirators and not this defendant and the other defendants.

65 12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to support the contentions of the government without, at the same time, sufficiently placing before the jury the evidence which tended to support the contentions of this defendant.

13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant a continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were known to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition Law unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

66 20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whisky to be secured at Hobbs, Kentucky and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, to-wit, whisky, for beverage purposes as distinguished from any other purpose or purposes.

23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whisky without a permit in manner and form as is charged in the indictment; to transport the said whisky for beverage purposes in manner and form as is charged in the indictment; to possess the said whisky for sale for beverage purposes in manner and form as is charged in the indictment; and

to sell the said whisky for beverage purposes in manner and form as is charged in the indictment.

67 24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whisky from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment, or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Frank McCann.

(Endorsed:) Filed Mar. 30, 1921. John H. R. Jamar, Clerk.

68 [Endorsed:] No. 7465. District Court of the United States of America, Northern District of Illinois, Eastern Division. United States of America v. Frank McCann et al. Motion for a new trial. McCormick, Kirkland, Patterson & Fleming, lawyers, Tribune Building, Chicago. Telephone Randolph 2929.

69 And on to wit: the sixth day of May, 1921, there was filed in the office of the Clerk of said Court, an Opinion of Hon. Evan A. Evans, Circuit Judge, in words and figures following, to wit:

70 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER et al.

Motion for a New Trial.

Several grounds are presented as the basis for a new trial. Earnestly argued and supported by a brief evidencing study and thought, the disposition of the motion calls for an expression of the Court's reasons for overruling it.

Variance Between Pleading and Proof.

The indictment charges the defendants therein named with having conspired "with divers other persons to said grand jurors unknown," etc. Certain offered but rejected evidence would, it is claimed, have shown that the names of such persons were known to the grand jurors. This, it is claimed, was a fatal variance, and numerous cases are cited to support this position. United States v. Riley, 74 Fed. 210; Naftzger v. United States, 200 Fed. at 501; Cook v. People, 231, Ill. 9; State v. Smith, 89 N. J. L. 52; Mitchell vs. United States, 229 Fed. 357. In opposition, the following may be cited. Jones v. United States, 179 Fed. 584, 593; People v. Smith, 239 Ill. 91, 108; People v. Mather, 4 Wend. 229, 21 Am. Dec. 122, 152.

The two decisions, Jones v. United States, 179 Fed. 584, and People v. Smith, 239 Ill. 91, respectively, admittedly support the Court's ruling, while the decision of Judge Taft in United States vs. Riley, 74 Fed. 210, cited and chiefly relied upon by defendants, may at least be distinguished by the fact that it was not a case involving a conspiracy prosecution. Ruling Case Law, while citing but one case, announces this rule of law to be as the court applied it. 14 R. C. L. 182, 183.

71 But ignoring the cases and such distinction for the moment, I am not impressed with the reasonableness of a rule that, without qualification, recognizes a fatal variance between an indictment which alleges on the part of the grand jury an absence of knowledge of the names of others participating in a conspiracy and proof that certain of such other persons were known to the grand jurors and may have been, in some manner, connected with the conspiracy.

Better reasoning, it seems to me, requires me to go back to the constitutional provision to ascertain the requirements of an indictment, and to test the sufficiency of the charge by the essentials

therein provided. In other words, determine whether the defendants are informed with such certainty as to the nature and cause of the accusation against them as to permit each, assuming his innocence, to properly prepare for trial. If the accused is so informed, the indictment is sufficient. If not, it fails, not because of variance, but because of the requirements of the constitution, Sixth Amendment which reads:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

The rule was laid down in Cochran and Sayre v. United States, 157 U. S. 286, as follows:

"The true test is, not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

It would require no stretch of the imagination to conceive of a charge, which, assuming that a defendant is innocent, would be insufficient in view of the therein contained false or inaccurate allegations that another party not indicted is to the grand jury unknown. Likewise, it would be equally easy to imagine a case where the name or names of "divers other persons" would not be helpful to the defendants. Testing the indictment by these tests, we find nothing suggestive of deception. There is nothing which would mis-
72 lead any defendant. Some thirty-one are named as conspirators. The means are set out with sufficient particularity, and the various overt acts give dates, places and names with so much particularity that no defendant could possibly claim that he was taken by surprise by any of the testimony offered by the government.

From this indictment, it appears that a carload of whiskey, containing one thousand cases, was, pursuant to the conspiracy to which the thirty-one defendants and others were parties, purchased from the Old Grandad Distillery Company of Louisville, Kentucky; and, by means of a false and forged permit, shipped to Chicago, to be there distributed among the smaller bootleggers or dealers, who, in turn, acted as the spokesmen or representatives of still smaller bootleggers. The serial numbers on the various cases of whiskey appear, the route which the car took is given, the date of the arrival of the

car in Chicago; the date of the reconsignment of the car at Peoria, Ill., also appears; the false permit which the shipper used to secure the shipment of the whiskey was a matter of record; the books and records of the distillery company were accessible to the defendants. In fact, it seems to the court that the allegations were sufficient to apprise each defendant, innocent or guilty, of sufficient information to permit him to meet every issue.

True, the names of Joy, Miller, Fitzpatrick, Frank and others do not appear as co-conspirators. Neither is it charged that those young chauffeurs who drove the trucks containing the whiskey from the cars to the place of destination, were co-conspirators. Many others, who at this time might be mentioned, were not named as conspirators. For instance, the railroad detectives, the police officers, present in abundance at the car, certain railroad employees, to say nothing of many others who contributed their cash to make up the $135,000 alleged to be paid to Heitler, Perlman and Greenberg. Perhaps some of them were the "divers other persons to the grand jury unknown."

73 But conceding for the moment that these parties were co-conspirators, that their names were known to the grand jury, was it necessary, in view of what had been set forth in the indictment, to name them as co-conspirators in order that defendants might fully understand the charges which they were to meet. I think not.

But did the grand jury know the names of other conspirators? It may be true that they knew the names of Joy, Miller, FitzPatrick and Mickey Frank, but were they in a conspiracy? Or did they merely violate the National Prohibition Act? Vastly different are the two offenses. This was clearly illustrated on the trial. Numerous defendants were dismissed, not because the evidence failed to establish a criminal case against them, but because it failed to establ the offense of conspiracy against them. The jury likewise acquitted six defendants, not necessarily because they were not guilty of some crime, but because they were not in the conspiracy charged in the indictment. In view of the hours which counsel devoted to the argument on this very distinction, it is hardly necessary to review the evidence.

Must this court, then, become a reviewing court to determine what the evidence before the grand jury established?

And this brings me to a consideration of the difference between a conspiracy charge and a criminal offense such as was considered in the opinion in the Scott case. To establish a conspiracy to violate a certain criminal statute, the evidence must convince a jury that defendants did something other than participate in the substantive offense which is the object of the conspiracy. To illustrate, A, B and C may each have purchased this whiskey from D, E and F, may have carried it from the freight car in which it arrived, yet not have been in the conspiracy to which D, E and F were parties. How can the grand jury's conclusion, necessarily based in part upon their personal observation of witnesses, be reviewed? Can their finding

be impeached? If so, can it be impeached by the fact that
74 one or two of the many witnesses who testified before the grand jury also testified upon this trial, and gave counsel or the court an impression which may not have been obtained by the grand jury? I think clearly such review would be unwarranted: not only unjustifiable in law, but impossible in fact. Take, for instance, the witness Joy, whom the defense now claims to have been in the conspiracy (though at the same time denying that their clients, whom Joy's testimony involves, are in the conspiracy). He was the subject of a long, well prepared and skillfully directed cross examination. Under the attack, he was restive, defiant and bellicose. May not the impression of his testimony and appearance before the grand jury have been entirely different, though his story was substantially the same? That he violated the National Prohibition Act may be conceded. That his testimony before the grand jury was the same as upon this trial may also be admitted; but it by no means follows that the grand jury believed he was in the conspiracy charged in the indictment.

And what has been said of Joy applies, of course, with even greater effectiveness to the many others.

While this might well dispose of the matter, still another reason is suggested for adhering to the view which the court took on the trial. This reason applies with force where the number of conspirators runs into the hundreds.

There is no requirement in law that all conspirators be joined in any single indictment. Such as may well be tried in one case should only be named as defendants in any one indictment. The present trial convinced the court that thirty defendants is a large number to try at one time.

But the testimony indicated that a jury might (though not necessarily) have found that the number implicated in this conspiracy was several hundred. Having concluded to limit the number
75 to thirty-one, was the grand jury required to investigate and ascertain who the others were and to name them? Must all the facts as to those not in the indictment be investigated to judicially determine whether each was or was not in the conspiracy, notwithstanding they are to be named in another indictment? Must the grand jury, upon a partial investigation name some of them as co-conspirators though not as defendants? Fairness to such "other divers persons" not named as defendants, I think, requires the grand jury to hesitate before naming them in such a manner as to impair their reputation without at the same time affording to each a prompt opportunity to exonerate himself.

While the argument in support of the alleged variance was based upon the offered testimony of Joy and of grand jurors who, it is claimed, would testify that Joy appeared and gave testimony before them, it seems to me that failure to name others than Joy would be as fatal as failure to name Joy. But counsel has directed his argument to the failure of the grand jury to name Joy as one of the "divers other persons", and it is apparent as to him that defendants were fully advised concerning his story even before the government began its investigation. When the police officers were making their

so-called investigation, and were examining various witnesses; in fact, any and all witnesses, excepting Heitler and Perlman and various policemen charged with participation in this crime, the defendants learned, if they did not already know, that they were charged by Joy, Miller, Frank and others with having conceived this conspiracy and carried it out substantially as these witnesses stated upon the witness stand.

If the purpose of an indictment be to apprise the defendants of the nature and character of the charge so that each defendant, be he innocent or guilty, may prepare adequately for trial, then the failure of the grand jury to name Joy or any other person was not fatal in this case.

76 Did the Court Err in Permitting Witnesses to Testify on Rebuttal and in Refusing to Grant a Day's Continuance After the Government's Testimony Closed?

Both because it was rebuttal and because it was within the court's discretion to admit it, though properly a part of the government's evidence in chief, I think no error was committed in receiving testimony offered by the government on rebuttal. The government took nearly three weeks in which to introduce its evidence. The defendants made no opening statement of their case at the beginning of the trial, and neither the court nor the prosecution knew what position the defense would take until the government rested. Certain government witnesses testified that the defendants Heitler, Greenberg and Perlman agreed to and did return a part of the money received from purchasers whose whiskey was taken from their trucks in Chicago by certain "highwaymen" on the night the car was unloaded. That three truck loads were held up in the streets in Chicago; that the highwaymen, who the witness said were policemen, took two trucks and their loads of whiskey, is not disputed. Witnesses, who stated they paid Heitler, Perlman and Greenberg some thirty-one thousand dollars for this whiskey, testified for the government, and said they demanded the return of this money as they had been guaranteed police and Federal Government protection, which was explained to mean protection against holdups other than regular holdups. They further stated that money had been returned to them, or to others who gave them money, for this whiskey. The defendants denied returning any money to any one. One witness, on rebuttal testified that certain sums of money were sent to him in an envelope after a conversation was had with Heitler and Perlman.

Defendants likewise denied all knowledge of the shipment and of participation in the conspiracy, specifically denying that one Moore was employed by them to sell any part of the carload of whiskey. Moore was called on rebuttal to dispute this testimony. Other testimony need not be detailed.

77 Certainly, under the circumstances, a fair exercise of the Court's discretion demanded that the ultimate facts, which the parties for weeks had sought to prove or disprove, be illuminated by this persuasive testimony.

As to the request for a continuance for a day, I cannot, in view

of the situation disclosed at the trial, doubt the propriety of the ruling. Three witnesses only are claimed as surprise. The first was Moore. The evidence showed defendant Perlman met and talked with Moore, who was avoiding the government. Perlman said he talked with Moore about his testimony before the government saw him. Moore testified to certain conversations with Perlman, and they were denied by Perlman. The defense knew Moore would be called if he could be located by the government. This was known several days before Moore testified.

Another witness, a garage keeper, was brought into the court and several defendants asked if they had seen him on the night the whiskey was unloaded. This occurred several days before the defendants closed their case. On cross examination, the defense showed they knew more of this man's history than he knew himself. With many closely typewritten pages before him, counsel for the defense cross examined him searchingly and particularly in reference to this night's occurrences, showing not only no surprise, but skill and industry on the part of defendants' investigators in preparing for his cross examination.

The other witness testified as to a conversation with Heitler and Perlman respecting the payment of money and his refusal to accept checks. The conversation was on a street corner outside a poolroom. No one was present but this witness and the two defendants, Heitler and Perlman. The latter two denied the conversation in toto. The defense here, too, was apprised of the witness's coming appearance several days before he was put on the stand.

Notwithstanding this situation, the court did take a short recess, and the defense produced a witness who left the impression that further delay was unjustifiable.

78 Did the Court Err in Refusing to Give the Proposed Instruction?

The court was favored with some twenty proposed instructions submitted by various defendants, covering the subject of testimony of accomplices. In fact, the proposed instructions submitted by all of the counsel must have covered a hundred pages. Under these circumstances, as well as for other reasons, it became necessary for the court to make its own analysis of the case and submit its views of the law applicable. Of course, the proposed instructions were helpful, but it was not consistent with my idea of a proper analysis and a concise presentation of the issues to incorporate all of the proposed instructions, even though many of them, standing alone, were unobjectionable.

Complaint is now made, however, because the court refused to give a proposed instruction advising the jury that it should not convict the defendants upon the uncorroborated testimony of accomplices. The instruction as given reads as follows:

"Certain of the government's witnesses have been called accomplices. They are witnesses who admit that they are parties to the

crime charged in the indictment. Their testimony should be scrutinized closely to ascertain whether they are influenced by any hope of immunity or by any other unworthy motive. Admitting their own guilt, their testimony is not entitled to the same weight as the testimony of an innocent party. * * *

"But the fact that certain witnesses w-o have testified may be accomplices, * * * will not justify you in rejecting their testimony on that ground alone. The government in criminal cases must sometimes offer the testimony of those who were parties to the crime. Innocent individuals may know nothing of the details of the crime, and only the guilty parties can enlighten you about the criminal transaction. * * *

"The jury should, therefore, approach his (the accomplice's) testimony with some caution. They are required to scrutinize it closely, not rejecting it, but scrutinizing it carefully, and only cautiously accepting it. * * *"

The vice of the charge lies in the fact, so it is claimed that the court did not advise the jury that conviction should not rest upon the unsupported testimony of accomplices. To have given this charge would, I think, have been error. Since the decision in Caminetti v. United States, 242 U. S. 470, courts have generally recognized the rule therein announced that conviction may rest upon the uncorroborated testimony of an accomplice. A few of
79 such cases are herewith collected. Graboyes v. United States, 250 Fed. 793; Kelly v. United States, 258 Fed. 392, 406; Reeder v. United States, 262 Federal 36, 42; Ray v. United States, 265 Fed. 257; Freed v. United States, 266 Fed. 1012; Harrington v. United States, 267 Fed. 97; Block v. United States, 267 Fed. 542.

Counsel for defendants contend, however, that the proposed instruction only goes to the extent of advice from the court. In other words, the proposed instruction did not require the jury to acquit unless the testimony of accomplices was corroborated, but did express the court's views on such testimony. If such proposed instruction was merely intended as an expression of the court's opinion of the weight to be given to testimony of accomplices, it was clearly a matter of judgment on the part of the trial judge whether such expression of opinion should be given or not. Certainly I have no hesitancy in declining to accept any hard and fast rule governing the weight of testimony of certain witnesses. If the trial judge is to express his opinion upon the evidence (and I certainly think he should exercise that privilege whenever he thinks it necessary) he should be guided by the testimony in the -stant case rather than by any rule that may be generally applicable. In other words, the testimony of accomplices may be weak. Courts may hesitate about accepting it. But in certain cases the court may be thoroughly convinced that it is the truth. Should he, therefore, nothwithstanding his general opinion of this class of testimony, ignore the conclusions reach in the individual case and advise the jury in a manner contrary to what his judgment tells him is the fact? I have no hesitancy in answering this query in the negative.

Criticism is also made because the court refused to charge the jury as requested by defendants concerning the character and nature of the conspiracy charged in the indictment. In this charge
80 the court was guided by the fact that each and every one of the attorneys, both in argument to the court, and in argument before the jury, stated that there was no question of the existence of the conspiracy, and that the only issue between the government and the defendants was over the identity of the parties to the conspiracy. In other words, while each denied that his client was in the conspiracy, the existence of the conspiracy was conceded. It was with this concession as a background that the court charged the jury as it did in respect to the conspiracy.

Remarks of Counsel.

Numerous statements in the prosecutor's opening argument to the jury, which was decidedly brief, were challenged. At the time the court was under the impression that an experienced counsel was endeavoring to embarrass the speaker who was inexperienced in presenting a case to the jury. Scarcely a thought was presented without interruptions and challenged. The court unfortunately was occupied in preparing its charge and perhaps did not hear all of the argument. Only a few of the criticisms will be considered.

It is claimed that government counsel referred to the defendants' alibi as a "faked alibi," criticism being directed to the word "fake." Webster's International Dictionary defines the word "fake" as "to make; to construct." As sued by counsel, it was, I think, understood to mean a made, a manufactured, or false alibi. To characterize it as a false or "faked" alibi was certainly justifiable from the government's point of view, for it was the contention of the government that the witnesses, who testified to the facts that established the alibi, were either mistaken or they testified falsely.

Counsel is also charged with having said, speaking of Heitler:

81 "How much like Shylock he looked. He demanded his pound of flesh and he bled his victims."

Also:

"Mike was playing a part when he sat in this witness chair. He is a great actor. He wanted to impress you how meek and humble he is."

It is claimed this statement and the argument made in support of it was an appeal to prejudice based upon the nationality of Heitler, who counsel stated was a Jew. The court observed that so far as the comment was directed to the appearance or manner or conduct of Heitler, as shown by the testimony, it was proper, adding, however:

"I wish to say, however, that if any one of you thinks it has any reference to religion in this case, you cannot decide on race or religion. Race or religion has no bearing in this case any more than sympathy or prejudice. As whether the defendant

Heitler impressed you as playing a part or not, that is for you to say, and is a proper statement for counsel to argue."

The attorney also promptly added:

"I wish also to state that there was no idea on my part to bring in anybody's race or religion."

It may be true that the Shylock that Shakespear immortalized was a Jew, but the character pictured by the master's pen in The Merchant of Venice has been found in all ages, among all races, and in all businesses. Unfortunately, no race has a monopoly of him,—no age that does not produce too many of him. Thus it is, when one is selfish, covetous, grasping, when he drives a hard and onesided bargain, he is not infrequently referred to as a Shylock.

It was not for the court to determine the Wisdom of the reference, or the appropriateness of the characterization. The court was merely to determine whether there was any evidence to justify the argument.

In the present case, witnesses testified that Heitler, Perlman and Greenberg bought a carload of whiskey for $32,000 and sold it to bootleggers for $135,000; requiring the purchasers to pay cash in advance; that they gave no receipts for moneys advanced and did not bind themselves to deliver any particular grade of
82 whiskey, and this, all in violation of the law of the land.

Nevertheless, when defendant's counsel subsequently insisted that this statement was a reflection upon the defendant Heitler's race and religion, the court specifically charged the jury to disregard the entire statement.

Further objections was made to the statement purporting to be as follows:

"Mike walks to the chair and you would think that Mike was going to the Electric chair, he was so solemn. In answer to the questions of his counsel, he is meek and humble. Why, it is not the same man that threatened Morris Frank with death in the Englewood station. It is not the same king of the Underworld who, with a snap of his fingers, holds the lives of men in his grasp. No, but he cried."

Objection was made because of its appeal of prejudice and because the statement was unsupported by the record. There was testimony that Heitler threatened Frank with death, and that it occurred in the Englewood station. There was testimony in the record that Heitler had been convicted and sent to the penitentiary for violation of this so-called Mann Act or White Slave law. There was testimony that he had run various places and that some at least had been closed up because of their bad repute. The court, nevertheless, ruled in reference to the allegation that Heitler was "King of the Underworld:"

"I recall no testimony that supports such argument."

and further stated:

"The statement that he was King of the Underworld and that he holds the lives of people in the snap of his fingers is improper."

Counsel is also charged with having said, when referring to Heitler weeping upon the witness stand:

"If all the tears that Mike caused were gathered in one reservoir, Mike Heitler could swim in it, asking for mercy."

Whether such statement was made or not, the court cannot say. At any rate, the court did not so understand it at the time. Later, defendant's counsel having referred to it, the court specifically and in its last charge to the jury instructed them as follows:

83 "During the argument of the attorneys, some reference was made to tears having been shed. I do not believe I understood counsel making the statement at the time. I am not sure, but I want to, now at this time, admonish you that anything outside of this record, outside what was received on this trial is not proper."

Of course, the foregoing excerpts from the argument of assistant prosecutor do not fairly represent the entire argument. Viewed as an entirety, no impression could possibly have been given the jury that would have influenced it to decide the case other than on the facts. So satisfied were the defendants with the impression which the government prosecutor left, that, I am advised, they seriously considered the advisability of waiving any and all argument.

It follows that the motion for a new trial must be and is hereby denied. The court will impose the sentences on Wednesday, May 11th, at 9:30 A. M. The clerk will notify all counsel.

EVAN A. EVANS,
Judge.

(Endorsed:) Filed May 6, 1921. John H. R. Jamar, Clerk.

84 And on, to wit, the twelfth day of May, 1921, came the Defendants by their attorneys and filed in the Clerk's office of said Court certain Motions in Arrest of Judgment in words and figures following, to wit:

85 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

v.

MICHAEL HEITLER et al.

Motion in Arrest of Judgment.

Now after the verdict against the defendant, Michael Heitler, and before sentence, comes the defendant, Michael Heitler, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase,
86 transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING, *Attorneys for Michael Heitler.*

(Endorsed:) Filed May 12, 1921. John H. R. Jamar, Clerk.

87 [Endorsed:] No. 7465. District Court of the United States of America Northern District of Illinois Eastern Division. United States of America v. Michael Heitler, et al. Motion in Arrest of Judgment. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago. Telephone Randolph 2929.

88 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA
v.
NATHANIEL PERLMAN et al.

Motion in Arrest of Judgment.

Now after the verdict against the defendant, Nathaniel Perlman, and before sentence, comes the defendant, Nathaniel Perlman, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

89 4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING, *Attorneys for Nathaniel Perlman.*

(Endorsed:) Filed May 12, 1921. John H. R. Jamar, Clerk.

90 [Endorsed:] No. 7465. District Court of the United States of America, Northern District of Ilinois, Eastern Division. United States of America v. Nathaniel Perlman, et al. Motion in Arrest of Judgment. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago. Telephone Randolph 2929.

91 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA
v.
MANDEL GREENBERG et al.

Motion in Arrest of Judgment.

Now after the verdict against the defendant, Mandel Greenberg, and before sentence, comes the defendant, Mandel Greenberg, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

92 4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Mandel Greenberg.

(Endorsed:) Filed May 12, 1921. John H. R. Jamar, Clerk.

93 [Endorsed:] No. 7465. District Court of the United States of America, Northern District of Illinois, Eastern Division. United States of America v. Mandel Greenberg, et al. Motion in Arrest of Judgment. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune, Chicago. Telephone Randolph 2929.

94 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA
v.
FRANK McCANN et al.

Motion in Arrest of Judgment.

Now after the verdict against the defendant, Frank McCann, and before sentence, comes the defendant, Frank McCann, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said act and the said Sections thereof prohibit the
95 purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING, *Attorneys for Frank McCann.*

(Endorsed:) Filed May 12, 1921. John H. R. Jamar, Clerk.

96 [Endorsed:] No. 7465. District Court of the United States of America, Northern District of Illinois, Eastern Division. United States of America v. Frank McCann, et al. Motion in Arrest of Judgment. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago. Telephone Randolph 2929.

97 And afterwards, to wit, on the 12th day of May, 1921, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

98 In the United States District Court, Northern District of Illinois, Eastern Division, Thursday, May 12, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

This cause coming on again to be heard on motion of the Defendants Nathaniel Perlman, Mandel Greenberg, Michael Heitler, George F. Quinn and Frank McCann, for a new trial herein, come the parties by their attorneys and after arguments of counsel the Court being fully advised in the premises, overrules and denies said motion, to which ruling of the Court said defendants by their attorney duly except and enter their motion in arrest of judgment, and this cause coming on to be heard on said motion in arrest of judgment herein, come the parties by their attorneys and after hearing the arguments of counsel the Court being fully advised in the premises, overrules and denies said motion, to which ruling of the court the said Defendants by their attorney duly except. Whereupon it is ordered by the Court that the further trial of this cause be and the same hereby is continued until Tuesday, May 17, A. D. 1921, at 9:30 o'clock A. M.

99 And afterwards, to wit, on the 12th day of May, 1921, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following judgment, to wit:

100 In the United States District Court, Northern District of Illinois, Eastern Division, Thursday, May 12, A. D. 1921.

Present: Honorable Evan A. Evans, Circuit Judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and the Defendants George F. Quinn, William J. Trudel and Frank McCann, in their own proper persons to have the sentence and judgment of the court pronounced upon them, they having heretofore on the 8th day of March, A. D. 1921, one of the days of this term of this court been adjudged guilty by a jury in due form of law, as charged in the indictment filed herein against them, and each Defendant being asked by the Court if he has anything to say why the sentence and judgment of the Court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and ordered by the court and is the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid that each of the Defendants George F. Quinn, William J. Trudel, and Frank McCann, forfeit and pay to the United States a fine in the sum of Two Thousand Dollars, without costs, said fines to be paid by May 25, A. D. 1921, at twelve o'clock noon, and in default of same, said Defendants to stand committed to the County Jail of Will County, Illinois, until said fines be paid.

It is further ordered by the court that the bond heretofore given by each of said Defendants remain in force.

101 And afterwards, to wit, on the 17th day of May, 1921, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following Judgment, to wit:

102 In the United States District Court, Northern District o Illinois, Eastern Division, Tuesday, May 17, A. D. 1921.

Present: Honorable Evan A. Evans, Circuit Judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and the Defendant Michael Heitler in his own proper person to have the sentence and judgment of the court pronounced upon him, he having heretofore on the 8th day of March, A. D. 1921, one of the days of this term of this court, been adjudged guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and ordered by the Court and is the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the Defendant, Michael Heitler, be confined and imprisoned in the United States Penitentiary, at Leavenworth, Kansas, for and during a period of eighteen months and that he forfeit and pay to the United States a fine in the sum of ten thousand dollars, besides one third of the costs in this behalf expended, and that execution issue therefor.

It is further ordered by the court that the sentence in this cause begin to run at the date of the delivery of the said Defendant to the Warden of the United States Penitentiary at Leavenworth, Kansas.

103 And afterwards, to wit, on the 17th day of May, 1921, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following Judgment, to wit:

104 In the United States District Court, Northern District of Illinois, Eastern Division, Tuesday, May 17, A. D. 1921.

Present: Honorable Evan A. Evans, Circuit Judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and the Defendant Nathaniel Perlman, in his own proper person to have the sentence and judgment of the court pronounced upon him he having heretofore on the 8th day of March, A. D. 1921, one of the days of this term of this court, been adjudged guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and ordered by the court and is the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the Defendant Nathaniel Perlman be confined and imprisoned in the United States Penitentiary, at Leavenworth, Kansas, for and during a period of fifteen months and that he forfeit and pay to the United States a fine in the sum of Ten Thousand Dollars, besides one third of the costs in this behalf expended, and that execution issue therefor.

It is further ordered by the court that the sentence in this cause begin to run at the date of the delivery of the said defendant to the Warden of the United States Penitentiary at Leavenworth, Kansas.

105 And afterwards, to wit, on the 17th day of May, 1921, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following Judgment, to wit:

106 In the United States District Court, Northern District of Illinois, Eastern Division, Tuesday, May 17, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and the Defendant Mandel Greenberg in his own proper person to have the sentence and judgment of the court pronounced upon him, he having heretofore on the 8th day of March, A. D. 1921, one of the days of this term of this court, been adjudged guilty by a jury in due form of law as charged in the indictment filed herein against him, and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon him and showing no good and sufficient reasons why sentence and judgment should not be pronounced, it is therefore considered and ordered by the court and is the sentence and judgment of the court upon the verdict of guilty so rendered herein by the jury as aforesaid, that the Defendant Mandel Greenberg be confined and imprisoned in the United States Penitentiary at Leavenworth, Kansas, for and during a period of one year and one day and that he forfeit and pay to the United States a fine in the sum of Ten Thousand Dollars, besides one third of the costs in this behalf expended, and that execution issue therefor.

It is further ordered by the court that the sentence in this cause begin to run at the date of the delivery of the said defendant to the Warden of the United States Penitentiary at Leavenworth, Kansas.

107 And afterwards, to wit, on the 17th day of May, 1921, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

108 In the United States District Court, Northern District of Illinois, Eastern Division, Tuesday, May 17, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED SATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and on motion of the Defendants Michael Heitler, Nathaniel Perlman and Mandel Greenberg. by their attorneys and upon filing their respective petitions for a writ of error and an assignment of errors, it is ordered by the court that a writ of error be and hereby is allowed each of said Defendants to have reviewed in the United States Supreme Court, the judgment this day entered herein, and that the said Defendants have ninety days within which to file their bill of exceptions.

It is further ordered by the court that the amount of the bond on the writ of error of each of said defendants be and it hereby is fixed at the sum of ten thousand dollars—said bond to act as a supersedeas, and that the appearance bond heretofore given by each of said defendants stand until May 20, A. D. 1921.

109 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants, a manifest error hath happened, to the great damage of the said Nathaniel Perlman, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of May, in the year of our Lord one thousand nine hundred and twenty-one.

——— ———,
Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed by:
EVAN A. EVANS,
Acting U. S. Dist. Judge.

110 NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this 3rd day of October, A. D. 1921.

JOHN H. R. JAMAR,
Clerk of the United States District Court, Northern District of Illinois.

111 [Endorsed:] Supreme Court of the United States. The United States of America, Plaintiff, v. Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants. Writ of Error. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago, Telephone Randolph 2929, and Thomas J. Symmes.

112 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants, a manifest error hath happened, to the great damage of the said Frank McCann, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and twenty one.

——— ———,
Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed by:
EVAN A. EVANS,
Acting U. S. Dist. Judge.

113 NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this 3rd day of October, A. D. 1921.

JOHN H. R. JAMAR,
Clerk of the United States District Court, Northern District of Illinois.

114 [Endorsed:] Supreme Court of the United States. The United States of America, Plaintiff, v. Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants. Writ of error. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago, Telephone Randolph 2929, and Thomas J. Symmes.

115 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants, a manifest error hath happened, to the great damage of the said George F. Quinn, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 25th day of May, in the year of our Lord one thousand nine hundred and twenty one.

——— ———,
Clerk of the District Court of the United States
for the Northern District of Illinois.

Allowed by:
EVAN A. EVANS,
Acting Judge *U. S. D. Judge.*

116 NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this 3rd day of October, A. D. 1921.

JOHN H. R. JAMAR,
Clerk of the United States District Court,
Northern District of Illinois.

117 [Endorsed:] Supreme Court of the United States. The United States of America, Plaintiff, v. Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants. Writ of error. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago, Telephone Randolph 2929, and Thomas J. Symmes.

118 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants, a manifest error hath happened, to the great damage of the said Michael Heitler, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of May, in the year of our Lord one thousand nine hundred and twenty one.

——— ———,
Clerk of the District Court of the United States
for the Northern District of Illinois.

Allowed by:
EVAN A. EVANS,
Acting U. S. Dist. Judge.

119 NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this 3rd day of October, A. D. 1921.

JOHN H. R. JAMAR,
Clerk of the United States District Court,
Northern District of Illinois.

120 [Endorsed:] Supreme Court of the United States. The United States of America, Plaintiff, v. Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants. Writ of error. McCormick, Kirkland, Patterson & Fleming, lawyers, Tribune Building, Chicago, Telephone Randolph 2929, and Thomas J. Symmes.

121 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between The United States of America, Plaintiff, and Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants, a manifest error hath happened, to the great damage of the said Mandel Greenberg, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court of the United States within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 17th day of May, in the year of our Lord one thousand nine hundred and twenty one.

——— ———,
Clerk of the District Court of the United States
for the Northern District of Illinois.

Allowed by:
EVAN A. EVANS,
Acting U. S. Dist. Judge.

122 NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ, I herewith transmit to the Supreme Court of the United States a true and complete transcript of the record and proceedings in the foregoing entitled cause this 3rd day of October, A. D. 1921.

JOHN H. R. JAMAR,
Clerk of the United States District Court,
Northern District of Illinois.

123 [Endorsed:] Supreme Court of the United States. The United States of America, Plaintiff, v. Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, Defendants. Writ of error. McCormick, Kirkland, Patterson & Fleming, lawyers, Tribune Building, Chicago, Telephone Randolph 2929, and Thomas J. Symmes.

124 And afterwards, to wit, on the 25th day of May, 1921, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

125 In the United States District Court, Northern District of Illinois, Eastern Division, Wednesday, May 25, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the parties by their attorneys and on motion of the Defendants Frank McCann and George F. Quinn by their attorneys, the court being fully advised in the premises, it is ordered by the court that the said defendants be and they hereby are given leave to adopt the assignment of errors filed herein by Michael Heitler

and others on May 17, A. D. 1921, and thereupon, and upon filing their respective petitions for a writ of error, it is ordered by the court that a writ of error be and hereby is allowed to each of said Defendants to have reviewed in the United States Supreme Court, the judgment heretofore entered herein on May 12, A. D. 1921, and that the amount of the bond on the writ of error of each of said Defendants be and it hereby is fixed at the sum of Three Thousand Dollars—said bond to to act as a supersedeas—and that said defendants have until May 28, A. D. 1921, to file their respective bonds.

126 And on, to wit, the 17th day of May, 1921, came the Defendants, by their attorneys and filed in the Clerk's office of said Court a certain Assignment of Errors in words and figures following, to wit:

127 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

v.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, and FRANK McCANN.

Assignment of Errors by Michael Heitler, Nathaniel Perlman, Mandel Greenberg, and Frank McCann and George F. Guinn.

Comes now the said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George F. Quinn and Frank McCann, defendants in the above entitled cause, in their own proper persons and by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, their attorneys, and in connection with their petition for a Writ of Error herein, say that in the record and proceedings prior to and during the trial of the above entitled cause in the said District Court, error has intervened to their prejudice and to the prejudice of each of them and make the following assignment of errors, which they, the said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George F. Quinn and Frank McCann, aver occúrred on the trial of said cause, to-wit:

I.

The said District Court erred in denying the motions in arrest of judgment herein on behalf of the said Michael Heitler, Nathaniel Perlman, Michael Greenberg, George F. Quinn and Frank McCann. The grounds of the said motion in arrest were as follows:

128 1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the Untied States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

II.

The said District Court erred in denying the motion made on behalf of the defendants at the close of the evidence offered by the government to direct the jury to find the defendants and each of them not guilty. Said error is predicated upon the following reasons:

1. There is no evidence tending to prove that the defendants, or any of them, at any time, were parties to or members of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport,
129 sell and possess for sale, intoxicating liquor, to-wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

2. There is no evidence tending to prove that the defendants, or any of them, at any time, were parties to or members of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendants, or any of them, ever agreed with any individual, or ever intended or conspired, to procure whiskey without a permit, from the Old Grand-Dad Distillery of Louisville, Kentucky; to transport the said whiskey without a permit and not for nonbeverage purposes from Louisville, Kentucky, to Chicago, Illinois; to sell the said whiskey in Chicago aforesaid for beverage purposes; and to possess the said whiskey for sale in Chicago aforesaid for beverage purposes.

3. There is no evidence tending to prove any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the conspiracy therein charged, was an act committed or done to *affect of* said conspiracy or combination; or was an act committed or done by the defendants, or by any or either of them, or by any alleged co-conspirator acting in their behalf or

the behalf of any or either of them; or was an act committed or done by the defendants, or any or either of them, or by any alleged co-conspirator acting in their behalf or in behalf of any or either of them, in manner and form as the said overt acts are in the indictment herein set forth and alleged, in that

a. The verdict of the jury finding Nicholas Ambrosi, a defendant and alleged co-conspirator, not guilty under the indictment herein shows that Michael Heitler, Robert Perlman and Mandel Greenberg, either jointly or individually, did not on, to wit, September 25, 1920, at Chicago aforesaid collect a large sum of money from the said Nicholas Ambrosi, the government not having attempted to prove the collection of any sum of money by the said Heitler, Perlman or Greenberg from the other individuals named in that
130 portion of the indictment setting forth Avert Act Number One.

b. The dismissal of the defendant, Morris H. Gindich, from the case, and the evidence conclusively disproves the allegations of Overt Act Number Two, that Morris Gindich was a conspirator and that he procured the reconsignment at Peoria of the Rock Island Car which contained the intoxicating liquor aforesaid.

c. The dismissal from the case of the defendants, O. H. Wathen and W. F. Nebelcamp, conclusively disproves the allegations of Overt Act Number Three, that the said Wathen and Nebelcamp were co-conspirators or members of any conspiracy alleged to have been shown by the evidence.

d. The verdict of the jury finding the defendant William Gorman not guilty of the charge against him under the indictment herein conclusively disproves the allegations of Overt Act Number Five, that the said William Gorman was a conspirator or member of any conspiracy alleged to have been shown by the evidence.

e. The evidence adduced on behalf of the government merely tends to show that Michael Heitler, Robert Perlman and Mandel Greenberg were present on October 1, 1920 at Gresham Station in Chicago aforesaid during a portion of the time said intoxicating liquor was being unloaded from the said Rock Island Car; there is no evidence tending to show that the said Heitler, Perlman or Greenberg or any or either of them "unloaded said distilled spirits and intoxicating liquor from said Rock Island Car #155,364" as is alleged in the allegations of the indictment setting forth the Fifth Overt Act.

III.

The said District Court erred in denying the motion made on behalf of the defendants at the close of all the evidence in the case to direct the jury to find them, and each of them, not guilty.
131 The said error is predicated upon the reasons and grounds set forth in support of Assignment II; therefore the said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George F.

Quinn and Frank McCann pray the Court to consider this Assignment III the same as it would if said grounds were set out herein.

IV.

The District Court erred in that, over the objection of the defendants, the prosecuting attorney was permitted to make the following statement: "You have heard the evidence, when asked whether or not he was ever convicted in the United States Court, under the White Slave Act, and Mike (referring to the defendant Michael Heitler) answered 'Yes,'" for the reason that there is no evidence in the record to show that the said defendant was ever convicted for a violation of the said Act.

V.

The District Court erred in not charging the jury, at the request of the defendants, to disregard the following statement of the prosecuting attorney; "It" (meaning the defendant Michael Heitler) "is not the same king of the underworld, who, by the snap of his finger, holds the lives of men in his grasp," for the reason that the statement of the Court to the jury that "the statement, he was the kind of the underworld, who holds the lives of these people at the snap of his finger, was improper," was not a sufficient admonition to the jury.

VI.

The said District Court erred in declining to give at the request of the defendants the following instruction, to wit:

Defendants' Requested Instruction "C."

"The court instructs the jury that certain witnesses who have testified for the government—that is, the witnesses Morris Frank, Harry Frank, Louis Greengaard, John Fitzpatrick, John
132 Miller and Maurice Joy—may be found by the "jury to be accomplices." Accomplices are those who upon their own confession stand contaminated with guilt and admit participation in the very crime which they endeavor, by their testimony, to fix upon the defendants. If the jury find that any witness is such an accomplice, then the court further instructs the jury that an accomplice is an admissible witness, and a conviction may be had on the uncorroborated testimony of such a witness if the story as told is straightforward and has a ring of truth and indicates unequivocally the guilt of the defendants, but the jury are cautioned and advised to weigh carefully such testimony, to take into consideration the inducements or temptations which might prompt such a witness to testify falsely, to consider the feeling or interest and the general demeanor of such a witness on the stand. And finally, the jury are advised not to convict on the testimony of an accomplice unless corroborated by other testimony of an untainted character or by material facts established by independent evidence.

"Corroboration, within the meaning of this rule, means such support given to the accomplice's testimony as tends to establish the truth of that portion of his testimony which connects the defendants with the crime. It is not sufficient that some testimony may be found to establish a fact or circumstances testified to by an accomplice. The supporting testimony must also corroborate on the matter of guilt. It must have a tendency to prove what the accomplice's testimony, standing alone, was intended to prove."

The said error is predicated upon the following reasons:

1. The said instruction truly and fully states the law as applicable to this case.

2. The charge of the court does not contain any instruction which in substance is the equivalent of the said requested instruction.

3. The case on the evidence is such that as a matter of law the defendants were entitled to the said requested instruction, in that

a. The connection of the defendants and each of them with any conspiracy shown by the evidence to exist is made solely and
133 by virtue of the testimony of accomplices.

b. The testimony of the said accomplices is self-contradictory, and tainted with confessed malice.

c. The testimony of the said accomplices was contradicted in important details by credible witnesses both for the government and for the defense.

VII.

The said District Court erred in giving the following instruction to the jury: "Certain of the Government's witnesses have been called accomplices. They are witnesses who admit that they are parties to the crime charged in the indictment. Their testimony should be scrutinized closely to ascertain whether they are influenced or not by any hope of immunity or by any other unworthy motive. Admitting their own guilt, their testimony is not entitled to the same weight as the testimony of an innocent party. The defendants are also vitally interested, and their interest in the outcome of the case may be considered by you in weighing the testimony of such as have testified.

"But the fact that certain witnesses who have testified may be accomplices, or that the defendants are interested in the outcome will not justify you in rejecting their testimony on that ground alone. The Government in criminal cases must sometimes offer the testimony of those who are parties to the crime. Innocent individuals may know nothing of the details of the crime, and only the guilty parties can enlighten you about the criminal transaction.

"Let me refer again to an imaginary case by way of illustration, to aid you in determining what weight might be given to the testi-

mony of an accomplice. Assume, if you will that A and B are indicted and on trial for entering the house of X in the night time and with the intent to burglarize it. C appears as a witness and states that he was with A and B on the night in question and all three of them broke into the house of X and took therefrom moneys, jewelry and bonds. Now C's testimony shows him to be a confessed accomplice.

134 "The jury would therefore approach his testimony with some caution. They would be required to scrutinize it closely, not reject it, but scrutinize it carefully, and only cautiously accept it."

* * * * * * *

"You may likewise find that other witnesses who testified in this case were accomplices; for example, the truck drivers or other individuals who were present at the car. The same rules govern their testimony. You have a right in accepting or rejecting their testimony to inquire whether it corresponds with the statements of other witnesses. You have, for example, in evidence, the written memorandum of the witness Koehler, the Rock Island agent. The number of cases and the number of the truck licenses are there given. It may be considered by you in determining what weight should be given to the testimony of the other witnesses whom you may find were accomplices. In other words, where stories, unrelated or disconnected, are in complete or reasonably complete accord, they thereby become more persuasive of their truth."

The said error is predicated upon the following reasons:

1. The said instruction does not adequately safeguard the rights of the defendants for the reasons set forth in Assignment VI, which reasons the defendants pray the Court to consider as if herein set forth in full.

2. The said instruction merely informs the jury that the jury should cautiously accept the testimony of an accomplice and that the jury should not reject such testimony.

3. The said instruction does not properly state the rule of corroboration.

VIII.

The said District Court erred in declining to give at the request of the defendants the following instruction, to-wit:

135 *Defendants' Requested Instruction "D."*

"The court instructs the jury that the defendants are charged with a conspiracy to commit four offenses, that is, the offense of purchasing a certain one thousand cases of whiskey from the Old Grand-Dad Distillery Company of Louisville, Kentucky, without first ob-

taining a permit from the Commissioner of Internal Revenue so to do; the offense of transporting the said whiskey from Hobbs, Kentucky to Chicago, Illinois, for beverage purposes; the offense of selling said whiskey at Chicago for beverage purposes; and the offense of possessing said whiskey at Chicago with the intent of selling the same for beverage purposes. Because of the failure to negative exceptions contained in the National Prohibition Act, especially in Section 6 thereof, the indictment is defective in its description of the offense of purchasing without a permit, and the jury should disregard this allegation as surplusage. The indictment, therefore, is to be considered by the jury as if it charged a conspiracy to commit three offenses, that is, the offense of transporting, of selling and of possessing for sale, the said whiskey in manner and form as these offenses are described in the indictment. Before any defendant may be convicted in this case, it must appear that he was connected with a conspiracy which had as an object or end the commission of all three of these offenses, and if the jury find that a defendant was a member of a conspiracy which had as an object or end the commission of only one or two of the said three offenses, then the jury must find that defendant not guilty."

The said error is predicated upon the following reasons:

1. The said instruction truly and fully states the law as applicable to this case.

2. The charge of the Court is not the equivalent of the said instruction, but on the contrary, the said charge is complained of in Assignment IX.

3. The provisions of the National Prohibition Act are such that a failure to negative an exception results in defective and in-
136 complete allegations which fail to charge an offense.

4. The allegations that the conspiracy had certain objects, are descriptive of the conspiracy and consequently the proof must show that the conspiracy had, in fact, as an object the commission of the offenses of transporting, selling and possessing for sale intoxicating liquor for beverage purposes as is charged in the indictment.

5. As a corollary to reason 4, supra, it is not sufficient to prove that the conspiracy had as an object the commission of only *only* one or two of the said offenses.

IX.

The said District Court erred in giving the following instruction to the jury, to-wit:

"In this case, the government charges the defendants with having conspired to violate the National Prohibition law. Without going into details, let me say the National Prohibition Law provides that 'No person shall, on or after the date when the Eighteenth Amendment of the United States Constitution goes into effect, manufacture,

sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as provided in this act'

"In general it may be said that the law prohibits dealing in intoxicating liquor or shipping intoxication liquor excepting for medicinal purposes or for sacramental uses, and for these uses permits must be issued by the duly constituted agencies of the government. It was therefore unlawful to ship whiskey from Louisville, Kentucky, to Chicago, without a lawful permit. It was unlawful to sell this liquor and unlawful for any individual to have this liquor in his possession unless it was for medicinal or sacramental uses.

"I charge you that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition law, unless you find that such possession or such sale was for medicinal purposes or sacramental uses.

137 "You should therefore, early direct your attention to this question: Was there a conspiracy to thus violate the National Prohibition law?"

* * * * * * *

"Now, briefly stated, the government claims that the evidence tends to establish that certain individuals formed a conspiracy to violate the National Prohibition Law by causing a certain carload of whiskey to be secured at Hobbs, Kentucky, and to be shipped to Chicago, Illinois, under an alleged government permit, and to be unloaded in Chicago and distributed to persons who were not under the law entitled to receive the same."

The said error is predicated upon the following reasons:

1. The said instruction is not a correct description of the conspiracy charged in the indictment.

2. The said instruction permitted the jury to find the defendants and each of them, guilty of an offense with which they were not charged.

3. The said instruction omitted essential elements of the crime with which the defendant was charged in that it omitted to state

a. That the possession must be a possession for sale.

b. That the transportation, sale and possession for sale must be such for beverage purposes.

c. The word "distributed" includes transactions other than sale or possession for sale.

d. The expression "unless * * * for medicinal purposes or sacramental uses" excludes from consideration all non-beverage uses other than medicinal or sacramental.

X.

The said District Court erred in giving the following instruction to the jury, to-wit:

"You may find that individuals other than the defendants in this case were in the alleged conspiracy to violate the National Prohibition law in the manner set forth in this indictment. You will not concern yourselves with any individual not named in this
138 indictment, or not now before you. The fact that others may be guilty of this same offense does not excuse any of the defendants before you, should you find them or any of them to have participated in the conspiracy.

"Whether any party other than the defendants should be prosecuted or when they should be prosecuted or how they should be prosecuted is not a matter in which you are now interested.

"The indictment charges that various individuals who are on trial before you as well as others joined in this conspiracy to violate the National Prohibition Act. Who the others may be is of interest so far as this case is concerned only as their connection of their story tends to establish the guilt or innocence of the defendants before you."

The said error is predicated upon the following reason, to-wit; the said instruction ignored the importance of one of the defenses of the defendants, to-wit, that the conspirators were not the defendants herein, but were the government witnesses, Joy, Miller, the Franks and their accomplices, who, in order to save themselves, conspired to incriminate and convict the defendants.

XI.

The said District Court erred in that, after stating to the jury the contentions of the government, the said Court declined to give at the oral request of the defendants an instruction which would place before the jury the contention of the defendants that the conspiracy charged in the indictment was a conspiracy on the part of the government witnesses Joy, Miller and their associates and that the defendants were not guilty thereof, and that the jury should take into consideration the said government witnesses to the extent, at least, of determining whether or not the said government witnesses or the defendants, Heitler, Perlman, Greenberg and McCann were the conspirators guilty of the charge in the indictment.

139 XII.

The said District Court erred in that, after giving at the request of the defendants the following instruction, to-wit:

"The court instructs the jury that before any defendant can be convicted, the evidence must show beyond a reasonable doubt that

a conspiracy existed as charged in the indictment, and that, at least one of the overt acts charged in the indictment was done by a conspirator to effect the object or end of this conspiracy. By the dismissal from this case of Morris H. Gindich, O. H. Wathen and W. F. Knebelcamp, the second and third overt acts are removed from consideration as overt acts done by a conspirator. To warrant a conviction by any defendant, the jury must not only be convinced that a conspiracy existed as charged in the indictment, but the jury must also be convinced beyond a reasonable doubt that, in order to effect the object of the said conspiracy, either First, that Michael Heitler, Robert Perlman and Mandel Greenbreg were conspirators, or that one of them was a conspirator, and that on or about September 25, 1920, at Chicago, they, or one or two of them collected a sum of money from Nicholas Ambrosi.

"Or Second; that William Gorman was a conspirator and that he, on October 1, 1920, at Chicago, told G. F. Koeller that Morris Gindich was the Max Bergson who was named as consignee of the car of whiskey.

Or Third; that Michael Heitler, Robert Perlman and Mandel Greenberg were conspirators and that they, or one or two of them, on October 1, 1920, were not only present at Gresham Station, but also unloaded the whiskey from the freight car,"

the Court qualified the said instruction as follows, to-wit:

"I want to say with reference to that last that it does not have to be shown that they personally picked up the cases and carried them out. They could have participated in unloading the freight car without personally having carried out the goods."

The said error is predicated upon the fact that the allegation in the indictment that the defendants Michael Heitler, Nathaniel Perlman and Mandel Greenberg and others "unloaded said distilled
140 spirits and intoxicating liquor from said Rock Island Car No. 155364" is only proved by evidence which shows an actual unloading and personal participation therein by the defendants Heitler, Perlman and Greenberg.

XIII.

The said District Court erred in sustaining the objection of the government to, and in declining to receive, evidence offered by the defendants, to-wit:

1. That the grand jury which returned the indictment in this case knew the names of Maurice Joy, John Miller, Morris Frank, Harry Frank, Louis Greengaard and John Fitzpatrick and that the names of the said individuals were not "unknown to the grand jury."

2. That the said grand jury knew the said individuals were co-conspirators with the defendants, if any conspiracy there was.

3. That the witness Joy had made known to the said grand jury in his testimony before it, and that the said grand jury knew, the connection of the said Joy with the alleged conspiracy, and that the connection of the said Joy with the said conspiracy was known by the grand jury to have been that of a co-conspirator and in substance the connection disclosed by the said Joy in his testimony in this case, the defendants having offered the said Joy and a member of the said grand jury as witnesses to prove the facts hereinbefore set forth.

XIV.

The said District Court erred in sustaining the objection of the government to, and in declining to receive, evidence offered by the defendants, to-wit:

1. That the witness John Miller had had a carload of Grand-Dad whiskey prior to February, 1920, and that he had disposed of it.

141 2. That the witnesses John Miller and Maurice Joy had been engaged in the illegal traffic in intoxicating liquor between the effective date of the National Prohibition Act and October 1st, 1920.

The said error is predicated upon the following reasons, to-wit:

1. The facts in the record were such, at the time the offer of such evidence was made, that said evidence was competent to support one of the contentions of the defendants, to-wit, that the said Joy and Miller had brought the whiskey, involved in this case, to Chicago; that the defendants had not done so; and that, in short, the said Joy and Miller were the conspirators in this case and not the defendants.

2. Said evidence was competent for the purpose of impeaching the said Joy and Miller, they, and each of them, having denied on cross-examination having had such liquor dealings.

XV.

The said District Court erred in sustaining the objection of the government to the proposed line of questioning sought to be put to the witness Joy by the defendants as to prior liquor sales by Joy, to-wit:

"Isn't it a fact that you got money from him (meaning one Eddie Frank) to sell him liquor."

The said error is predicated upon the following reasons:

1. The evidence sought to be elicited was proper as affecting the credibility of the witness.

2. The evidence sought to be elicited was proper to show that the witness had testified falsely in this case, in that he denied such prior sales.

3. The evidence sought to be elicited was proper to support the contention of the defendants that Joy and his associates were the conspirators and not the defendants.

142 XVI.

The said District Court erred in sustaining the objection of the government to the following questions asked by the defendants, to-wit:

1. "Did you have anything to do with the carload of whiskey that Miller got in January?" which question was asked of the witness Joy on his cross-examination.

2. The line of questioning sought to be put to the witness Morris Frank on his cross-examination, to-wit, as to prior liquor dealings and persons to whom he sold.

The said error is predicated upon the reasons set forth in Assignment XV, which reasons the defendants pray the Court to consider as if fully set forth herein.

XVII.

The said District Court erred in not granting to the defendants the continuance requested to enable them to investigate the truth of the testimony of the witness Todd and to enable them to meet said testimony. The said error is predicated upon the following reasons:

1. The said evidence should have been brought forward in chief and not in rebuttal.

2. The testimony of the witness showed that he was controlled by Maurice Joy.

3. The defendants knew nothing of the matters testified to by the said witness.

4. The reputation of the said witness for truth and honesty could not be investigated by the defendants in the short time at their disposal.

5. The defendants were taken by surprise by the said testimony and were not prepared to meet it.

143 XVIII.

The said District Court erred in not granting the motion of the defendants for a new trial, for the reasons set forth in support of Assignments II to XVII, which reasons the defendants pray the Court to consider as if herein set forth in full.

Wherefore, the said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George F. Quinn and Frank McCann, by reason of the errors aforesaid, pray that the said judgments and sentences against

and upon them, the said Michael Heitler, Nathaniel Perlman, Mandel Greenberg and Frank McCann, under the indictment herein, may be reversed and held for naught.

MICHAL HEITLER.
NATHANIEL PERLMAN.
MANDEL GREENBERG.
FRANK McCANN.
GEORGE F. QUINN.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Michael Heitler, Nathaniel Perlman, Mandel Greenberg and Frank McCann.
JUSTIN F. McCARTHY,
Attorney for George F. Quinn.

(Endorsed:) Filed May 17, 1921. John H. R. Jamar, Clerk.

144 And on, to wit, the 17th day of May, 1921, came the defendant, Michael Heitler, by his attorney and filed in the clerk's office of said Court a certain Petition in words and figures following, to wit:

145 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

THE UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, et al.

Comes now Michael Heitler, petitioner, defendant in the above entitled cause, and respectfully shows that a verdict of guilty was returned against him by a Jury under the indictment herein in the above entitled cause in said District Court, and that judgment and sentence were pronounced by said District Court on the 17th day of May, A. D. 1921, upon said verdict against your petitioner, by virtue of which judgment and sentence your petitioner was convicted of violating Section 37 of the Federal Penal Code, as charged in the indictment herein, and sentenced on the indictment herein, as follows:

To be imprisoned eighteen months in the Federal Penitentiary in Leavenworth, Kansas, sentence to begin the date of delivery to the warden of the penitentiary and to be fined $10,000, and one-third costs.

146 And your petitioner respectfully shows that in said judgment and the proceedings had prior thereto in the above entitled cause, certain errors were committed, to the prejudice of your petitioner, all of which will more in detail appear by the joint and several assignment of errors which is filed in this Court by your petitioner, and other defendants herein, together with this petition.

Wherefore your petitioner, the said Michael Heitler, prays that a writ of error may issue in his behalf to said District Court out of the Supreme Court of the United States for the correction of the errors so complained of; and that said writ of error may be made a supersedeas as to your petitioner, and that your petitioner may be admitted to bail pending the determination of said writ of error; and that all further proceedings in the said District Court may be suspended and stayed, and that all further necessary orders or processes may be made or stayed, to the end that the errors complained of may be corrected by the said Supreme Court of the United States, and that said judgments and sentences may be set aside and held for naught.

Your petitioner further prays that a citation in due form of law may issue, requiring the United States of America, the defendant in said writ of error, to appear in said Supreme Court of the United States and then and there to make answer to the said assignment of errors made by your petitioner upon the record in the proceedings in said cause; and your petitioner herewith presents his assignment of errors, in accordance with the rules of the said Supreme Court of the United States and the course and practice in this Honorable Court.

147 Your petitioner further shows that similar verdicts of guilty were returned at the same time by the same Jury upon the same trial in the above entitled cause in said District Court against the defendants, Nathaniel Perlman, Mandel Greenberg, Frank McCann, George F. Quinn and William J. Trudell, and that judgment and sentence were pronounced in the above entitled cause upon each of the said defendants with whom your petitioner was so found guilty by said similar verdicts; that each of said persons will, as your petitioner is informed and believes, file in said District Court in his own behalf, an assignment of errors, together with a petition for a writ of error from the Supreme Court of the United States, and that in said petitions for writs of error so to be filed by them, the said defendants will pray that the judgments and sentences entered against them and each of them in the said District Court may also be reversed and held for naught by the said Supreme Court of the United States, and that each assignment of errors filed by said defendants in the said District Court will be substantially a duplicate of the assignment of errors herein filed on behalf of your petitioner.

Your petitioner, Michael Heitler, therefore prays that an order may be entered in his behalf directing the Clerk of said District Court to make return of the several writs of error respectfully prayed for by your petitioner and any other of said defendants with whom your petitioner was so found guilty by said similar verdicts, by

transmitting to the said Supreme Court of the United States a single, true copy of the record in the above entitled cause, said bill of exceptions, said several assignments of errors filed in said District Court in this cause, said several petitions for writs of error filed in said District Court in this cause, and other proceedings had
148 in said District Court in the above entitled cause necessary to the hearing in said Supreme Court of the United States of said writs of error.

Your petitioner further prays the Court to grant him leave to file an amended assignment of errors within ten (10) days after the bill of exceptions has been filed in said District Court.

MICHAEL HEITLER,
Defendant.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON
& FLEMING,
Attorneys for Michael Heitler, Nathaniel Perlman, Mandel Greenberg, and Frank McCann.

(Endorsed:) Filed May 17, 1921. John H. R. Jamar, Clerk.

149 And on, to wit, the 17th day of May, 1921, came the defendant, Nathaniel Perlman, by his attorney and filed in the Clerk's office of said Court a certain Petition, in words and figures following, to wit:

150 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

THE UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, et al.

Comes now Nathaniel Perlman, petitioner, defendant in the above entitled cause, and respectfully shows that a verdict of guilty was returned against him by a Jury under the indictment herein in the above entitled cause in said District Court, and that judgment and sentence were pronounced by said District Court on the 17th day of May, A. D. 1921, upon said verdict against your petitioner, by virtue of which judgment and sentence your petitioner was convicted of violating Section 37 of the Federal Penal Code, as charged in the indictment herein, and sentenced on the indictment herein, as follows:

To be imprisoned fifteen months in the Federal Penitentiary in Leavenworth, Kansas, sentence to begin the date of delivery to the warden of the penitentiary and to be fined $10,000, and one-third costs.

151 And your petitioner respectfully shows that in said judgment and the proceedings had prior thereto in the above entitled cause, certain errors were committed, to the prejudice of your petitioner, all of which will more in detail appear by the joint and several assignment of errors which is filed in this Court by your petitioner, and other defendants herein, together with this petition.

Wherefore your petitioner, the said Nathaniel Perlman, prays that a writ of error may issue in his behalf to said District Court out of the Supreme Court of the United States for the correction of the errors so complained of; and that said writ of error may be made a supersedeas as to your petitioner, and that your petitioner may be admitted to bail pending the determination of said writ of error; and that all further proceedings in the said District Court may be suspended and stayed, and that all further necessary orders or processes may be made or stayed, to the end that the errors complained of may be corrected by the said Supreme Court of the United States, and that said judgments and sentences may be set aside and held for naught.

Your petitioner further prays that a citation in due form of law may issue, requiring the United States of America, the defendant in said writ of error, to appear in said Supreme Court of the United States and then and there to make answer to the said assignment of errors made by your petitioner upon the record in the proceedings in said cause; and your petitioner herewith presents his assignment of errors, in accordance with the rules of the said Supreme Court of the United States and the course and practice in this Honorable Court.

152 Your petitioner further shows that similar verdicts of guilty were returned at the same time by the same Jury upon the same trial in the above entitled cause in said District Court against the defendants, Michael Heitler, Mandel Greenberg, Frank McCann, George F. Quinn and William J. Trudell, and that judgment and sentence were pronounced in the above entitled cause upon each of the said defendants with whom your petitioner was so found guilty by said similar verdicts; that each of said persons will, as your petitioner is informed and believes, file in said District Court in his own behalf, an assignment of errors, together with a petition for a writ of error from the Supreme Court of the United States, and that in said petitions for writs of error so to be filed by them, the said defendants will pray that the judgments and sentences entered against them and each of them in the said District Court may also be reversed and held for naught by the said Supreme Court of the United States, and that each assignment of errors filed by said defendants in the said District Court will be substantially a duplicate of the assignment of errors herein filed on behalf of your petitioner.

Your petitioner, Nathaniel Perlman, therefore prays that an order may be entered in his behalf directing the Clerk of said District Court to make return of the several writs of error respectfully prayed for by your petitioner and any other of said defendants with whom your petitioner was so found guilty by said similar verdicts, by

transmitting to the said Supreme Court of the United States a single, true copy of the record in the above entitled cause, said bill of exceptions, said several assignments of errors filed in said District Court in this cause, said several petitions for writs of error filed in said District Court in this cause, and other proceedings had
153 in said District Court in the above entitled cause necessary to the hearing in said Supreme Court of the United States of said writs of error.

Your petitioner further prays the Court to grant him leave to file an amended assignment of errors within ten (10) days after the bill of exceptions has been filed in said District Court.

NATHANIEL PERLMAN,
Defendant.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND
AND FLEMING,
Attorneys for Michael Heitler, Nathaniel Perlman, Mandel Greenberg, and Frank McCann.

(Endorsed:) Filed May 17, 1921. John H. R. Jamar, Clerk.

154 And on, to wit, the 17th day of May, 1921, came the defendant, Mandel Greenberg, by his attorney and filed in the Clerk's office of said Court a certain Petition, in words and figures following, to wit:

155 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

THE UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, et al.

Comes now Mandel Greenberg, petitioner, defendant in the above entitled cause, and respectfully shows that a verdict of guilty was returned against him by a Jury under the indictment herein in the above entitled cause in said District Court, and that judgment and sentence were pronounced by said District Court on the 17th day of May, A. D. 1921, upon said verdict against your petitioner, by virtue of which judgment and sentence your petitioner was convicted of violating Section 37 of the Federal Penal Code, as charged in the indictment herein, and sentenced on the indictment herein, as follows:

To be imprisoned one year and one day in the federal penitentiary in Leavenworth, Kansas, sentence to begin the date of delivery to the warden of the penitentiary and to be fined $10,000, and one-third costs.

156 And your petitioner respectfully shows that in said judgment and the proceedings had prior thereto in the above entitled cause, certain errors were committed, to the prejudice of your petitioner, all of which will more in detail appear by the joint and several assignment of errors which is filed in this Court by your petitioner, and other defendants herein, together with this petition.

Wherefore your petitioner, the said Mandel Greenberg, prays that a writ of error may issue in his behalf to said District Court out of the Supreme Court of the United States for the correction of the errors so complained of; and that said writ of error may be made a supersedeas as to your petitioner, and that your petitioner may be admitted to bail pending the determination of said writ of error; and that all further proceedings in the said District Court may be suspended and stayed, and that all further necessary orders or processes may be made or stayed, to the end that the errors complained of may be corrected by the said Supreme Court of the United States, and that said judgments and sentences may be set aside and held for naught.

Your petitioner further prays that a citation in due form of law may issue, requiring the United States of America, the defendant in said writ of error, to appear in said Supreme Court of the United States and then and there to make answer to the said assignment of errors made by your petitioner upon the record in the proceedings in said cause; and your petitioner herewith presents his assignment of errors, in accordance with the rules of the said Supreme Court of the United States and the course and practice in this Honorable Court.

157 Your petitioner further shows that similar verdicts of guilty were returned at the same time by the same Jury upon the same trial in the above entitled cause in said District Court against the defendants, Michael Heitler, Frank McCann, George F. Quinn, William J. Trudell and Nathaniel Perlman, and that judgment and sentence were pronounced in the above entitled cause upon each of the said defendants with whom your petitioner was so found guilty by said similar verdicts; that each of said persons will, as your petitioner is informed and believes, file in said District Court in his own behalf, an assignment of errors, together with a petition for a writ of error from the Supreme Court of the United States, and that in said petitions for writs of error so to be filed by them, the said defendants will pray that the judgments and sentence entered against them and each of them in the said District Court may also be reversed and held for naught by the said Supreme Court of the United States, and that each assignment of errors filed by said defendants in the said District Court will be substantially a duplicate of the assignment of errors herein filed on behalf of your petitioner.

Your petitioner, Mandel Greenberg, therefore prays that an order may be entered in his behalf directing the Clerk of said District Court to make return of the several writs of error respectfully prayed for by your petitioner and any other of said defendants with whom your petitioner was so found guilty by said similar verdicts, by transmitting to the said Supreme Court of the United States a single, true

copy of the record in the above entitled cause, said bill of exceptions, said several assignments of errors filed in said District Court in this cause, said several petitions for writs of error filed in said
158 District Court in this cause, and other proceedings had in said District Court in the above entitled cause necessary to the hearing in said Supreme Court of the United States of said Writs of error.

Your petitioner further prays the Court to grant him leave to file an amended assignment of errors within ten (10) days after the bill of exceptions has been filed in said District Court.

MANDEL GREENBERG,
Defendant.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Attorneys for Michael Heitler, Nathaniel Perlman, Mandel Greenberg, and Frank McCann.

(Endorsed:) Filed May 17, 1921. John H. R. Jamar, Clerk.

159 And on, to wit, the 25th day of May, 1921, came the defendant, Frank McCann, by his attorneys and filed in the Clerk's office of said Court a certain Petition, in words and figures following, to wit:

160 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

THE UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, et al.

Comes now Frank McCann, petitioner, defendant in the above entitled cause, and respectfully shows that a verdict of guilty was returned against him by a Jury under the indictment herein in the above entitled cause in said District Court, and that judgment and sentence were pronounced by said District Court on the 12th day of May, A. D. 1921, upon said verdict against your petitioner, by virtue of which judgment and sentence your petitioner was convicted of violating Section 37 of the Federal Penal Code, as charged in the indictment herein, and sentenced on the indictment herein, as follows: To be fixed two thousand ($2,000) dollars without costs, in default of payment to be confined in the Will County Jail until paid.

161 And your petitioner respectfully shows that in said judgment and the proceedings had prior thereto in the above entitled cause, certain errors were committed, to the prejudice of your

petitioner, all of which will more in detail appear by the joint and several assignment of errors which is filed in this Court by your petitioner, and other defendants herein, together with this petition.

Wherefore your petitioner, the said Frank McCann, prays that a writ of error may issue in his behalf to said District Court out of the Supreme Court of the United States for the correction of the errors so complained of; and that said writ of error may be made a supersedeas as to your petitioner, and that your petitioner may be admitted to bail pending the determination of said writ of error; and that all further proceedings in the said District Court may be suspended and stayed, and that all further necessary orders or processes may be made or stayed, to the end that the errors complained of may be corrected by the said Supreme Court of the United States, and that said judgments and sentences may be set aside and held for naught.

Your petitioner further prays that a citation in due form of law may issue, requiring the United States of America, the defendant in said writ of error, to appear in said Supreme Court of the United States and then and there to make answer to the said assignment of errors made by your petitioner upon the record in the proceedings in said cause; and your petitioner herewith presents his assignment of errors, in accordance with the rules of the said Supreme Court of the United States and the course and practice in this Honorable
162 Court.

Your petitioner further shows that similar verdicts of guilty were returned at the same time by the same Jury upon the same trial in the above entitled cause in said District Court against the defendants, Michael Heitler, Mandel Greenberg, George F. Quinn, William J. Trudell and Nathaniel Perlman, and that judgment and sentence were pronounced in the above entitled cause upon each of the said defendants with whom your petitioner was so found guilty by said similar verdicts; that each of said persons will, as your petitioner is informed and believes, file in said District Court in his own behalf, an assignment of errors, together with a petition for a writ of error from the Supreme Court of the United States, and that in said petitions for writs of error so to be filed by them, the said defendants will pray that the judgments and sentence entered against them and each of them in the said District Court may also be reversed and held for naught by the said Supreme Court of the United States, and that each assignment of errors filed by said defendants in the said District Court will be substantially a duplicate of the assignment of errors herein filed on behalf of your petitioner.

Your petitioner, Frank McCann, therefore prays that an order may be entered in his behalf directing the Clerk of said District Court to make return of the several writs of error respectively prayed for by your petitioner and any other of said defendants with whom your petitioner was so found guilty by said similar verdicts, by transmitting to the said Supreme Court of the United States a single, true copy of the record in the above entitled cause, said bill of exceptions, said several assignments of errors filed in said District Court in this cause, said several petitions for writs of error filed in said District

Court in this cause, and other proceedings had in said Dis-
163 trict Court in the above entitled cause necessary to the hearing in said Supreme Court of the United States of said Writs of error.

Your petitioner further prays the Court to grant him leave to file an amended assignment of errors within ten (10) days after the bill of exceptions has been filed in said District Court.

FRANK McCANN,
Defendant.

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON AND FLEMING.
Attorneys for Michael Heitler, Nathaniel Perlman, Mandel Greenberg, and Frank McCann.

(Endorsed:) Filed May 25, 1921. John H. R. Jamar, Clerk.

164 And on, to wit, the 25th day of May, 1921, came the defendant, George F. Quinn, by his attorney and filed in the Clerk's office of said Court a certain Petition, in words and figures following, to wit:

165 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

THE UNITED STATES OF AMERICA

v.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, and GEORGE F. QUINN.

Comes now George F. Quinn, petitioner, defendant in the above entitled cause, and respectfully shows that a verdict of guilty was returned against him by a jury under the indictment herein in the above entitled cause in said District Court, and that judgment and sentence were pronounced by said District Court on the 12th day of May, A. D. 1921, upon said verdict against your petitioner, by virtue of which judgment and sentence your petitioner was convicted of violating Section 37 of the Federal Penal Code, as charged in the indictment herein, and sentenced on the indictment herein, as follows:

To be fined two thousand ($2,000) dollars without costs, in default of payment to be confined in the Will County Jail until paid.

166 And your petitioner respectfully shows that in said judgment and the proceedings had prior thereto in the above entitled cause, certain errors were committed, to the prejudice of

your petitioner, all of which will more in detail appear by the joint and several assignment of errors which is filed in this Court by your petitioner, and other defendants herein, together with this petition.

Wherefore your petitioner, the said George F. Quinn, prays that a writ of error may issue in his behalf to said District Court out of the Supreme Court of the United States for the correction of the errors so complained of; and that said writ of error may be made a supersedeas as to your petitioner, and that your petitioner may be admitted to bail pending the determination of said writ of error; and that all further proceedings in the said District Court may be suspended and stayed, and that all further necessary orders or processes may be made or stayed, to the end that the errors complained of may be corrected by the said Supreme Court of the United States, and that said judgments and sentences may be set aside and held for naught.

Your petitioner further prays that a citation in due form of law may issue, requiring the United States of America, the defendant in said writ of error, to appear in said Supreme Court of the United States and then and there to make answer to the said assignment of errors made by your petitioner upon the record in the proceedings in said cause; and your petitioner herewith presents his assignments of errors, in accordance with the rules of the said Supreme Court of the United States and the course and practice in this Honorable Court.

167 Your petitioner further shows that similar verdicts of guilty were returned at the same time by the same jury upon the same trial in the above entitled cause in said District Court against the defendants, Michael Heitler, Mandel Greenberg, Frank McCann and Nathaniel Perlman, and that judgment and sentence were pronounced in the above entitled cause upon each of the said defendants with whom your petitioner was so found guilty by said similar verdicts; that each of said persons will, as your petitioner is informed and believes, file in said District Court in his own behalf, an assignment of errors, together with a petition for a writ of error from the Supreme Court of the United States, and that in said petitions for writs of error so to be filed by them, the said defendants will pray that the judgments and sentence entered against them and each of them in the said District Court may also be reversed and held for naught by the said Supreme Court of the United States, and that each assignment of errors filed by said defendants in the said District Court will be substantially a duplicate of the assignment of errors herein filed on behalf of your petitioner.

Your petitioner, George F. Quinn, therefore prays that an order may be entered in his behalf directing the Clerk of said District Court to make return of the several writs of error respectfully prayed for by your petitioner and any other of said defendants with whom your petitioner was so found guilty by said similar verdicts, by transmitting to the said Supreme Court of the United States a single, true copy of the record in the above entitled cause, said bill of exceptions, said several assignments of errors filed in said District Court in this cause, said several petitions for writs of error filed in said

District Court in this cause, and other proceedings had in
168 said District Court in the above entitled cause necessary to the hearing in said Supreme Court of the United States of said Writs of error.

Your petitioner further prays the Court to grant him leave to file an amended assignment of errors within ten (10) days after the bill of exceptions has been filed in said District Court.

GEORGE F. QUINN,
Defendant.

JUSTIN F. McCARTHY,
Attorney for George F. Quinn.

(Endorsed:) Filed May 25, 1921. John H. R. Jamar, Clerk.

169 And afterwards, to wit, on the 29th day of July, 1921, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit Judge, appears the following entry, to wit:

170 In the District Court of the United States for the Northern District of Illinois, Eastern Division, Friday, July 29, A. D. 1921.

Present: Honorable Evan A. Evans, circuit judge.

No. 7465.

UNITED STATES OF AMERICA

v.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, and GEORGE F. QUINN.

Order Extending Time to File Bill of Exceptions, etc.

Now come into open court the said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, defendants in the above entitled cause, by their attorneys and the United States by its attorneys, on this 29th. day of July, A. D. 1921 and it is stipulated in open court by the parties herein and it is thereon and by agreement ordered by the court:

1. That the time for the signing and sealing of the bill of exceptions herein, as the same may be settled and signed, be and the same is hereby extended until the 15th day of September, A. D. 1921, and that whenever so settled and signed, the said bill of exceptions herein shall stand as settled, signed and filed and made a part of the record herein as of the 13th day of August, A. D. 1921, which said 13th day of August, A. D. 1921 is within the time originally allowed by the court on the day when judgment was entered

herein for the presenting, signing and filing of said bill of exceptions herein;

2. That the jurisdiction and power of this court and of the Honorable Evan A. Evans, Judge, before whom and a jury said
171 cause was tried, or in his absence, the jurisdiction of any other judge of the said court, to settle and sign the said bill of exceptions herein, and to make the same a part of the record herein, be and is hereby preserved as of the 13th day of August, A. D. 1921, until said bill of exceptions herein shall be duly settled, signed and filed.

EVAN A. EVANS,
Judge.

Approved:
CHARLES F. CLYNE,
By EDWARD WEISEL,
United States District Attorney.

McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Michael Heitler, Nathaniel Perlman, Mandel Greenberg and Frank McCann.

JUSTIN F. McCARTHY,
Attorney for George F. Quinn.

172 And afterwards, to wit, on the 30th day of July, 1921, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Evan A. Evans, Circuit, Judge, appears the following entry by direction, to wit:

173 In the United States District Court, Northern District of Illinois, Eastern Division, Saturday, July 30, A. D. 1921.

Present: Honorable —— ——.

7465.

THE UNITED STATES

vs.

MICHAEL HEITLER et al.

Come the Defendants herein by their attorneys and on their motion and for good cause shown, it is ordered by the court that the time heretofore granted said Defendants within which to file their bill of exceptions herein be and the same hereby extended to September 15, A. D. 1921.

174 And afterwards to wit, on the 13th day of September, 1921, being one of the days of the regular September term of said

Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to wit:

175 In the District Court of the United States for the Northern District of Illinois, Eastern Division, Tuesday, Sept. 13, 1921.

Present: Honorable George A. Carpenter, district judge.

No. 7465.

UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK MCCANN, and GEORGE F. QUINN.

Order Extending Time or *File Bill of Exceptions, etc.*

Now come into open court the said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, defendants in the above entitled cause, by their attorneys and the United States by its attorneys, on this 13th day of September, A. D 1921, and it is stipulated in open court by the parties herein and it is thereon and by agreement ordered by the court:

1. That the time for the signing and sealing of the bill of exceptions herein, as the same may be settled and signed, be and the same is hereby extended until the 29th day of September, A. D. 1921, and that whenever so settled and signed, the said bill of exceptions herein shall stand as settled, signed and filed and made a part of the record herein as of the 13th day of August, A. D. 1921, which said 13th day of August, A. D. 1921 is within the time originally allowed by the court on the day when judgment was entered herein for the presenting, signing and filing of said bill of exceptions herein:

2. That the jurisdiction and power of this court and of the Honorable Evan A. Evans, Judge, before whom and a jury said
176 cause was tried, or in his absence, the jurisdiction of any other judge of the said court, to settle and sign the said bill of exceptions herein, and to make the same a part of the record herein, be and is hereby preserved as of the 13th day of August, A. D. 1921, until said bill of exceptions herein shall be duly settled, signed and filed.

——— ———,
Judge.

Approved:
CHARLES F. CLYNE,
By EDWIN WEISL,
United States District Attorney.

McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Michael Heitler, Nathaniel Perlman, Mandel Greenberg, and Frank McCann.

JUSTIN F. McCARTHY,
Attorney for George F. Quinn.

177 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK McCANN, and GEORGE F. QUINN

Præcipe.

To John H. R. Jamar, Esq.,
Clerk of the said Court:

You will please prepare a true and correct transcript of the record in the above entitled cause to be filed with the Clerk of the Supreme Court of the United States, in obedience to the five writs of error issued out of said court on behalf of the five above named defendants, Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, to wit:

(1) Return of indictment 7465, order to file same, and said indictment.

(2) Pleas of not guilty of all defendants.

(3) Order of February 15, 1921, dismissing, on motion of United States Attorney, the defendants, McCaffrey, O'Hara, Wissing, W. McGovern, Sam J. Cohen, and Block.

(4) Order of February 24, 1921, dismissing the defendants, Galvin, Kane, Marner, Wagman, Knebelkamp, Wathen, Smale, Judge, and Simmons.

(5) Order of March 4, 1921, dismissing, on motion of attorney for the United States, the defendant, Gindich, from the case.

(6) Order empanelling the jury.

(7) Verdict of the jury.

178 (8) All motions to direct verdicts made by the said defendants and all orders denying the same, and exceptions to such orders.

(9) All motions for a new trial made by said defendants and all orders denying same, and exceptions to such orders.

(10) All motions in arrest of judgment made by said defendants and all orders denying same, and exception to such orders.

(11) Judgments and sentences.

(12) The joint and several assignment of errors of the said five defendants.

(13) Order of May 25, 1921, permitting said defendant, Quinn, to join in said assignment of errors.

(14) The five petitions for writs of error filed by said defendants.

(15) All orders granting said writs of error and granting ninety days for Bill of Exceptions.

(16) Five original writs of error with returns thereof.

(17) Five original citations.

(18) Bill of Exceptions.

(19) Opinion of the Court.

(19*a*) Order extending line to file Bill of Exceptions.

(20) Præcipe.

(21) Certificate of Clerk authenticating transcript of the record.

(22) Certificate of Clerk of transmission of record to the Supreme Court of the United States pursuant to orders allowing writs of error.

McCORMICK, KIRKLAND, PATTERSON AND FLEMING,
Counsel for Defendants, Michael Heitler, Nathaniel Perlman, Mandel Greenberg, and Frank McCann.
JUSTIN F. McCARTHY,
Counsel for Defendant George F. Quinn.

Service of the above Præcipe acknowledged and copy thereof received this 21st day of July, A. D. 1921.

CHARLES F. CLYNE,
United States Attorney for the Northern District of Illinois.

(Endorsed:) Filed Jul. 21, 1921. John H. R. Jamar, Clerk.

179 [Endorsed:] No. 7465. In the District Court of the United States for the North-an District of Illinois, Eastern Division. United States of America vs. Michael Heitler, Nathaniel Perlman,

Mandel Greenberg, Frank McCann, and George F. Quinn. Præcipe. McCormick, Kirkland, Patterson & Fleming, Lawyers, Tribune Building, Chicago. Telephone Randolph 2929.

180 NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipe filed in this Court in the cause entitled United States of America vs. Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, as the same appear from the original records and files thereof now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 3rd day of October, A. D. 1921.

[Seal of Dist. Court, Northern Dist. Illinois, 1855.]

JOHN H. R. JAMAR,
Clerk.

181 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C. within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Michael Heitler is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said Michael Heitler as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Evan A. Evans, Judge of the Court of Appeals of the United States, this — day of June, in the year of our Lord one thousand nine hundred and Twenty-one.

EVAN A. EVANS,
Acting Judge U. S. Dist. Court.

O. K.
E. & E.

182 [Endorsed:] No. 7465. Supreme Court of the United States. Michael Heitler vs. United States of America. Citation to the Supreme Court of the United States. Weymouth Kirkland, Tribune Building, Chicago.

Service of the within citation is hereby accepted and acknowledged this 25 day of July A. D. 1921.

CHARLES F. CLYNE,
United States Atty.,
For the Solicitor General for the United States of America.

183 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Nathaniel Perlman is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said Nathaniel Perlman as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Evan A. Evans, Judge of the Court of Appeals of the United States, this — day of June, in the year of our Lord one thousand nine hundred and Twenty-one.

EVAN A. EVANS,
Acting Judge U. S. Dist. Court.

O. K.
E. & E.

184 [Endorsed:] No. 7465. Supreme Court of the United States. Nathaniel Perlman vs. United States of America. Citation to the Supreme Court of the United States. Weymouth Kirkland, Tribune Building, Chicago.

Service of the within citation is hereby accepted and acknowledged this 25 day of July, A. D. 1921.

CHARLES F. CLYNE,
United States Atty.,
For the Solicitor General of the United States of America.

185 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Mandel

Greenberg is plaintiff in — and you are — to show cause, if any there be, why the judgment rendered against the said Mandel Greenberg as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Evan A. Evans, Judge of the Court of Appeals of the United States, this — day of June, in the year of our Lord one thousand nine hundred and Twenty-one.

EVAN A. EVANS,
Acting Judge U. S. Dist. Court.

O. K.
E. A. E.

186 [Endorsed:] No. 7465. Supreme Court of the United States. Mandel Greenberg vs. United States of America. Citation to the Supreme Court of the United States. Weymouth Kirkland, Tribune Building, Chicago.

Service of the within citation is hereby accepted and acknowledged this 25 day of July, A. D. 1921.

CHARLES F. CLYNE,
United States Attorney,
For the Solicitor General for the United States of America.

187 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Frank McCann is plaintiff in error and you are defendant in error to show cause, if any thereby, why the judgment rendered against the said Frank McCann as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Evan A. Evans, Judge of the Court of Appeals of the United States, this — day of June, in the year of our Lord one thousand nine hundred and Twenty-one.

EVAN A. EVANS,
Acting Judge U. S. Dist. Court.

O. K.
E. A. E.

188 [Endorsed:] No. 7465. Supreme Court of the United States. Frank McCann vs. United States of America. Citation to the Supreme Court of the United States. Weymouth Kirkland, Tribune Building, Chicago.

Service of the within citation is hereby accepted and acknowledged this 25 day of July, A. D. 1921.

CHARLES F. CLYNE,
United States Attorney,
For the Solicitor General for the United States of America.

189 UNITED STATES OF AMERICA, *ss:*

The President of the United States to United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein George F. Quinn is plaintiff in error and you are defendant in error to show cause, if any there be, why the judgment rendered against the said George F. Quinn as in the said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Evan A. Evans, Judge of the Court of Appeals of the United States, this — day of June, in the year of our Lord one thousand nine hundred and Twenty-one.

EVAN A. EVANS,
Acting Judge U. S. Dist. Court.

O. K.
E. A. E.

190 [Endorsed:] No. 7465. Supreme Court of the United States. George F. Quinn vs. United States of America. Citation to the Supreme Court of the United States. Weymouth Kirkland, Tribune Building, Chicago.

Service of the within citation is hereby accepted and acknowledged this 25 day of July, A. D. 1921.

CHARLES F. CLYNE,
United States Attorney,
For the Solicitor General for the United States of America.

191 And on, to wit, the 29th day of September, 1921, came the defendants by their attorneys and filed in the Clerk's office of said Court a certain Bill of Exceptions in words and figures following, to wit:

192 Copy.

In the District Court of the United States of America for the Northern District of Illinois, Eastern Division

No. 7465.

UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER et al.

Bill of Exceptions.

Filed Sep. 29, 1921, at — o'clock — M.

JOHN H. R. JAMAR,
Clerk.

193 In the District Court of the United States of America for the Northern District of Illinois, Eastern Division.

No. 7465.

UNITED STATES OF AMERICA

vs.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, Edward Smale, George Hans, Morris H. Gindich, William A. Gorman, William G. Knebelkamp, Othe H. Wathen, Timothy Judge, Joseph P. Galvin, George F. Quinn, William J. Truedel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Joseph Marner and Max Wagman.

Bill of Exceptions.

Be is remembered That heretofore, at 10:00 o'clock A. M. on the 15th day of February, A. D. 1921, the above entitled cause came on for trial before the Honorable Evan A. Evans, a judge of the United States Circuit Court of Appeals for the Seventh Circuit, sitting as a judge of the District Court in the said district and division, and a jury, upon the indictment heretofore found herein,

Mr. Charles F. Clyne, United States District Attorney, by Messrs. John J. Kelly and James R. Glass, Assistant United States District Attorneys, appearing as counsel for the United States, and Messrs. McCormick, Kirkland, Patterson & Fleming, by Mr. Weymouth Kirkland, and Mr. Thomas J. Symmes appearing as counsel for the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg

and Frank McCann, and Mr. Justin F. McCarthy appearing
194 as counsel for the defendant George F. Quinn, and other attorneys representing the other defendants,

the following proceedings were had; that is to say, the United States, to maintain the issues on its part, introduced the following evidence, to wit:

RALPH W. STONE.

Direct examination.

By Mr. Glass:

My name is Ralph W. Stone. I reside at 6500 Harvard Avenue, Chicago. I am Federal Prohibition Director for the State of Illinois and have been since September 1, 1920. I have charge of the issuing of permits for the purchasing and transporting of liquor. I know that no liquor permit was issued to one Max Berkson. I have issued permits, Form 1410, to purchase, to Morris H. Gindich. The permit he holds from Washington is designated "Illinois B 221." The filing of an application and bond in accordance with Regulation 60, precedes the issuing of the permit. Government's Exhibit No. 1 is the application, Form 1404, that the applicant must execute in triplicate and submit to my office, together with bond, Exhibit No. 3. These are then passed by my office and forwarded to Washington where, after approval, permit Form 1505 is issued, one copy being retained in Washington and two copies forwarded to me, one of which I deliver to the permit-ee, said permit being Exhibit No. 2, bearing the number "Illinois B 221". No duplicates of permits bearing that number are issued from my office. Government's Exhibit No. 4 is consent to transfer the liability on the bond of Morris H. Gindich from one address to another. Government's Exhibit No. 5 is a letter dictated by himself to the Commissioner transmitting the other copy and the change of location. The permit was issued to Morris H. Gindich, 380 Kedzie Ave., Chicago, Illinois, and is to sell Kocher Wine to persons having permits to purchase the same. On that permit, Mr. Gindich could not have secured any whiskey. Government's Exhibit No. 6 is on Form 1410, called "Permit to purchase intoxicating liquor for other than beverage purposes," and bears serial No. B 221, Illinois, and calls for
195 permission to purchase Old Grand Dad Distillery Company Whiskey of Louisville, Kentucky, one thousand packages, and bears serial numbers of such packages, to wit, 270,013, to 123 and from 270, 124 to 1012. It is dated September 11th, 1920, is signed "Morris Berkson, Peoria, Illinois", and bears the signature, by stencil, as of date August 27th, 1920, of Hubert E. Howard, Federal Prohibition Director, and the name of R. J. Stone. The signature on Government's Exhibit No. 6 is not my signature. Prior to September 1st, 1920, Hubert E. Howard was Prohibition Director and I was his assistant. Form 1410 requires the signature of the permittee and is submitted to me. If the application is all right, after I have examined the records, to show my approval I

would mark "R. W. Stone" about where my presumed signature appears on Government's Exhibit No. 6. Government's Exhibit No. 6 did not go through my office in the regular course of business. The permittee, to obtain his liquor, sends or takes the permit to the distillery, pays the tax on the liquor, and obtains the shipment. The duplicate original would be returned by the distillery to my office bearing the notation, "The above described intoxicating liquors were shipped a certain day." Upon receipt of this Form 1410, it is put in the files as a received shipment. The railroad company retains a copy at the destination and the vendee, before obtaining the shipment, must be identified and sign the affidavit. Government's Exhibit No. 6 shows that Max Berkson received the shipment from the Old Grand Dad Distillery Co. at Louisville, Kentucky. The permit is signed and jurated September 7th dated September 11th, bears no seal and does not bear official character of the man taking the acknowledgment. Government's Exhibit No. 8 is a duplicate of Government's Exhibits Nos. 6 and 7, except that it has not the transportation affidavit, having come direct from the distillery. Government's Exhibits Nos. 6, 7 and 8 were thereupon offered and received in evidence.

Cross-examination.

By Mr. Darrow:

Morris H. Gindich having received one permit to purchase
196 could not have received another permit to purchase whiskey, but would have had to incorporate the purchasing of whiskey within the original permit. Copies of Form 1410 are kept in the office in filing cabinets, which were locked with keys, a bunch of which I kept in my room. Blanks of Form 1410 could be obtained at the counter room or from wholesale druggists. Often applications are brought into the office already signed and sworn to.

Cross-examination.

By Mr. Busch:

The blank Forms 1410 are not kept under lock and key, but are available to anybody asking for them and wholesale dealers carry around a stock in order to solicit trade. Under the law, there was nothing to prevent a wholesale dealer having a permit to purchase from visiting various distilleries and getting a price on whiskey. About June 7th, the practice originated in the office of having permits bear not only the rubber stamped signature of Hubert E. Howard, but also another name. There were several concerns in the city which were not watched with the care that others were, on approvals, and sometimes I would put my initials on the permits and at other times I would not. On defendant Wathen's Exhibit No. 1, purporting to be a permit on Form 1410, dated July 6th does not bear my name under that of Hubert E. Howard, but bears the name L. W. Gould. Defendant Wathen's Exhibit No. 2 purports to be a permit

on Form 1410, but is on a mimeograph form, which at times was used by the office, and purports to have been issued in March, 1920, and bears no name underneath the name of Hubert E. Howard, but bears the initials "A. B.," standing for A. B. Steele. I cannot state with positiveness the exact date when the custom of having a name under the stamped signature of Howard went into effect, there being one rule on May 9th, another on June 7th and still another on June 23rd, as near as I can remember. Neither the prohibition office nor the prohibition director has ever issued a list to the distilleries of those who were wholesale liquor dealers or a list of the numbers of such dealers, nor were any instructions issued
197 prior to the 28th day of September, as to a verification of permits. There were in the office three or four rubber stamps of the signature of Hubert E. Howard, which were kept on desks in the counter room. The Government did not furnish to distillers a list of the inspectors or other persons who were authorized to sign underneath the name of Hubert E. Howard.

Redirect examination.

By Mr. Glass:

The permit required the initials of the person who affixed the stencil imprint thereon. When I became Prohibition Director, I established the system of mailing the permits to the distillery instead of delivering them to the permittee to be delivered to the distillery.

Recross-examination.

By Mr. Busch:

In speaking of regulations, aside from Regulation 60 or those otherwise prescribed by law, I mean regulations made by myself for the conduct of the office. Each of the forty-eight Federal Prohibition offices in the United States has its own office procedure and there *in* no uniformity.

MARK J. POTTER.

Direct examination.

By Mr. Glass:

My name is Mark J. Potter. I reside in Chicago and my business is that of Federal Prohibition agent. I saw the defendant, Othe H. Wathen, at Louisville, Kentucky, on October 6th, 1920, and talked with him in the presence of William Bosler, a Federal Prohibition agent. I asked to see Forms 1410 for shipments made to Illinois in September. Mr. Wathen brought me one batch of 1410 Forms, but I did not find what I was looking for. I asked if he had any others and he produced a second package in which I found a 1410 Form signed by Max Berkson, said form being Government's Exhibit No. 8. I called Mr. Wathen's attention to the fact that the permit was

different from the others and he told me he had accepted it
198 as legitimate. He told me that he had made the sale to a man who had introduced himself as Max Berkson, that the whole transaction occupied about fifteen minutes and that there had been no previous correspondence He said payment had been made by draft on a New York bank in the sum of $32,000. The check to purchase the draft was deposited in The Liberty Insurance Bank. Mr. Wathen described the party who presented the permit as a man a little bit under medium stature, 150 to 160 pounds in weight, dark and apparently Jewish.

Cross-examination.

By Mr. Busch:

I believe Mr. Wathen understood from my question that I wanted to see his 1410's on Chicago. I then asked for his 1410's on Illinois and found among them the permit I was looking for.

JOSEPH V. CALLAHAN.

Direct examination.

By Mr. Glass:

My name is Joseph V. Callahan. I live in Chicago and am a Federal Prohibition agent. I am Group chief of Group Number One. On November 10th, 1920, I saw Mr. Wathen at Louisville, Kentucky, in the presence of Mr. William Marquette, a Prohibition Agent from the Louisville Office. I told Mr. Wathen who I was and that I wanted to investigate the whiskey shipment. He told me that the two men who presented a permit with the name of Max Berkson on it were about five feet ten and probably weighed 160 pounds, could speak English fairly well, might have been Jews, Italians or Greeks. The whiskey cost $32,000 of which $31,000 was paid in exchange and he thought the other $1,000 was paid by check. On November 13th, 1920, I saw Mr. Wathen in Chicago, in the Federal Building, and was present when he made his statement to Assistant District Attorney Kelly. Mr. Wathen told Mr. Kelly that the two men made three trips to his office, on the 24th, 25th and 27th of September. I heard Mr. Knebelkamp make a statement in Mr. Kelly's office. He said he was president of the Louisville
199 Baseball Club and that Mr. O. H. Wathen gave him $31,000 with which to purchase exchange, which he did. While in Louisville, I visited the National Bank of Kentucky and ascertained that Mr. Knebelkamp had there purchased a draft in the sum of $31,000, said draft being Government's Exhibit No. 10. Whereupon, Government's Exhibit No. 10 was offered and received in evidence.

Cross-examination.

By Mr. Busch:

When making the statements to Mr. Kelly, both Mr. Wathen and Mr. Knebelkamp answered all the questions Mr. Kelly asked them and they came here at the Government's request and at their own expense.

G. AUGUST VONDER-HAAR.

Direct examination.

By Mr. Glass:

My name is G. August Vonder-Harr. I live at 628 North 28th Street, Louisville, Kentucky, and I am a bank clerk (New York Exchange teller) in the National Bank of Kentucky, in Louisville, Kentucky. I remember Mr. Knebelkamp purchased a draft for $31,000.

JOSEPH M. HEAD.

Direct examination.

By Mr. Kelly:

My name is Joseph M. Head. I live at New Hope, Kentucky. I am the superintendent of the Old Grand Dad Distilling Company at Hobbs, Kentucky, and I am the ticket and freight agent of the Louisville and Nashville Railroad Company. On September 25th, I shipped one thousand cases to Max Berkson, Peoria, Illinois. Mr. Kennedy, an employe of the Old Grand Dad Distillery Company, instructed me to make the shipment. I sealed the car, as follows: East door, L. & N. Seal No. 355536; West door, 355537. The car number was Rock Island 155564. As soon as the car came in, we stenciled the cases and loaded. Each case bore the stencil "Max Berkson, Peoria, Illinois, permit number so and so, shipped from Old Grand Dad Distillery Company, Hobbs, Kentucky, C-64." The car left at 2:30 P. M.

200 Cross-examination.

By Mr. Busch:

I handled this shipment in exactly the same way that I handled all other shipments and kept a record of the car, the car number and its arrival and departure, which records were turned over to Government officials. This car was loaded and sent out the same day that it came in, which was the usual procedure. I worked for thirteen years with the Kentucky Distillery and Warehouse Company, and three years with F. M. Head & Company, Distillers, and

three years with Taylor & Williams, distillers. It was the custom of distillers to load and send off the car the same day it came in.

Cross-examination.

By Mr. Darrow:

I made out the bill of lading, having been told the permit number over the telephone.

Redirect examination.

By Mr. Kelly:

Mr. Kennedy gave me the permit number.

Recross-examination.

By Mr. Busch:

All records required to be kept in regard to a shipment of whiskey were kept in this case.

Re-redirect examination.

By Mr. Kelly:

Whereupon, Government's Exhibits Nos. 11 and 12 were offered in evidence, No. 11 being the original Bill of Lading from Hobbs, Kentucky, to Peoria, Illinois, issued to one Max Berkson.

G. J. SIMMONS.

Direct examination.

By Mr. Glass:

My name is G. J. Simmons. I reside in Chicago and am a Federal Prohibition Agent. I met the defendants Wathen and Knebelkamp, November 13th, in Mr. Kelly's office in Chicago. Mr. Wathen stated that the two men first asked if they could buy one thou-
201 sand cases for $31,000 and he refused. He said that they came back the following day, told him that they had taken it up with their Chicago representatives, or their Peoria representatives, and that they would take the one thousand cases and give him the money, sending him the other $1,000 the latter part of the week.

ERNEST CLIFTON KENNEDY.

Direct examination.

By Mr. Glass:

My name is Ernest Clifton Kennedy and I reside at 651 Granger Court, Louisville, Kentucky. I am a general clerk for the old Grand Dad Distillery Company, and R. E. Wathen & Company, and have been so employed for more than nine years. I have charge of the orders for whiskey. I called Mr. Head and instructed him to get the car. Government's Exhibit No. 13 is in my handwriting, is a duplicate of the order invoice for the shipment, is dated September 27th, 1920, and indicates that the whiskey had been shipped. Whereupon Government's Exhibit No. 13 was offered and received in evidence. Government's Exhibit No. 8 is the permit shown to me by Mr. Wathen on September 25th. After seeing said permit, I gave Mr. Head the permit number, to wit, "B-221, Illinois." The Bill of Lading, a letter, and three copies of the permit were put in an envelope and put on Mr. Wathen's desk, one copy to be mailed to the Prohibition Director. Government's Exhibit No. 14 is a $1,000 draft, being the balance of the purchase price on this whiskey. Whereupon, Government's Exhibit No. 14 was offered and received in evidence.

Cross-examination.

By Mr. Busch:

The fifth copy of the permit to purchase whiskey, Government's Exhibit No. 8, was retained by me for our files and was in its regular place in the file when Mr. Potter came to Louisville and took it away with him. I put one copy on the stenographer's desk to be mailed to the Prohibition Director.

202 Redirect examination.

By Mr. Glass:

Since the Prohibition Act became effective, we have had, approximately, three or four or five hundred shipments in one thousand case lots.

CHARLES JENKINS.

Direct examination.

By Mr. Glass:

My name is Charles Jenkins. I live in Peoria, Illinois, and I am chief re-consigning clerk for the ten railroads at Peoria. I handle all the inbound cars. On September 30th, there was a re-consignment of Rock Island Car, No. 155,364. The consignee was Max

Berkson, who presented himself to me on that day. To the best of my knowledge, Max Berkson is that gentleman (indicating the defendant Morris H. Gindich). Mr. Berkson gave me the diversion of the car from Peoria to Gresham Station on the C. R. I. & P., and I issued him an exchange Bill of Lading for his original bill. I took the original Bill of Lading and gave him an original and duplicate exchange Bill of Lading on Gresham, keeping a duplicate thereof in my files, said duplicate being Government's Exhibit No. 16. After I had fixed up the office records, I took him to the Big Four cashier's office, to Mr. Gooch, to whom he paid $452.69, and from whom he received a prepaid expense bill. Government's Exhibit No. 17 is a copy of the expense bill. I issued the necessary instructions to the Yard Department, ordering the car outbound. Whereupon, Government's Exhibits Nos. 16 and 17 were offered and received in evidence. I saw Max Berkson sign his name on the original Bill of Lading which I issued.

Cross-examination.

By Mr. Darrow:

The original Bill of Lading is Government's Exhibit No. 12. I ordinarily see ten or twenty people a day. This car came originally from Hobbs, Kentucky, through Louisville.

203 Cross-examination.

By Mr. Busch:

The Bill of Lading showed that this car contained one thousand cases of whiskey, that it came from the Old Grand Dad Distillery Company, at Hobbs, Kentucky, and was consigned to Max Berkson, Peoria, Illinois. Gresham Station is at 84th Street and Vincennes Road, in the City of Chicago.

ERNEST C. KENNEDY.

Recalled for further cross-examination.

By Mr. Darrow:

I saw the two men who were at Louisville. I do not remember seeing the defendant Gindich.

Cross-examination.

By Mr. Kirkland:

Neither Mr. Perlman, Mr. Greenberg or Mr. Heitler looks like either of the men who were in Louisville.

SAM W. GOOCH.

Direct examination.

By Mr. Kelly.

My name is Sam W. Gooch and I live in Peoria, Illinois. I am the teller for the P. & P. U. The re-consigning clerk, on September 30th, 1920, came to my window with two men, one of whom is now in the court room (indicating the defendant Morris H. Gindich.)

Cross-examination.

By Mr. Darrow:

I ordinarily do business with from one hundred to one hundred and twenty-five men a day. I stand inside of a cage, there being a wire screen over the window.

GEORGE F. KOELLER.

Direct examination.

By Mr. Glass:

My name is George F. Koeller. I live at Mokena, Illinois. I am a freight agent for the Rock Island Railroad at Gresham Station, 85th and Vincennes, in the city of Chicago, and have occupied that position since May 20th, 1920. I remember Rock Island
204 Car No. 155,463 arrived in the Rock Island yards about three or three-thirty, October 1st, 1920. I saw Government's Exhibits Nos. 6 and 7 in the freight office at Gresham Station, together with Government's Exhibits Nos. 18, 19 and 20, Exhibit No. 19 being an original Bill of Lading, Exhibit No. 18 being a duplicate thereof and Exhibit No. 20 being the original expense bill, given when the freight is paid. These papers were presented by one supposed to be Max Berkson, whom I do not see in the courtroom. Max Berkson was about five feet four or five inches in height, weighed about one hundred and forty or one hundred and forty-five pounds, had dark eyes and slightly curly hair, like most Jewish people. He asked me if the car was in and I told him that it was. I told him that he must be identified, whereupon he left the office (3:50 P. M.). At 4:55 P. M. he returned and in the meantime this car had been removed from 85th and Vincennes to 95th, for the reason that we close at five o'clock. I tried to get my superior by telephone, but was unsuccessful, and told Mr. Berkson to return the next day about 10:00 A. M. He thereupon left. I closed the office and went to get my train and when it arrived, Mr. Jack Turner, chief clerk in the office of Mr. Ames, Superintendent of the Chicago Terminals, at the La Salle Street Station, got off. He asked me about the car and why I had not delivered it. I then went home. I returned

from my home and arrived at Gresham freight station at 7:15 P. M. I met Mr. Jack Turner, Mr. Max Berkson and Mr. William Gorman at the freight house. Mr. Turner said that Mr. Gorman would identify Max Berkson. Max Berkson signed the permits and the expense bills. Government's Exhibit No. 20 is a duplicate of the expense bill signed by Max Berkson. Government's Exhibits Nos. 6 and 7 are the permits Mr. Berkson signed. Mr. Gorman signed Government's Exhibits Nos. 6 and 7 at the place where it is torn off, as a witness to Mr. Berkson's signature. I procured a light and we went to Rock Island Car 155,364. I broke the seals and opened the west side of the car with the assistance of several men who were there. I cannot identify any of the men in the courtroom as
205 having been there at that time, although I see one who looks like Mr. Berkson (indicating the defendant Morris Gindich). About seven or ten men were around the car door. After opening the car, an automobile truck backed up and we commenced to unload the whiskey on the truck. I set my lantern on a long box, got out a slip of paper and commenced checking the cases, there being one thousand cases. Five or six men were loading the first truck. I think I heard the names "Bob" and "Dave" mentioned. The automobile license numbers of the trucks and the number of cases received by each truck appear on Government's Exhibit No. 21, which is a list I made out that evening. The first truck, No. 32586, received one hundred cases. The second truck, No. 26579, received one hundred cases. I saw several men standing around near the car. I cannot recognize any of the men in the court-room here as being any of those standing at the truck. The third truck, No. 68531, received one hundred and ten cases. The fourth truck, No. 29232, received fifty cases. The only conversation I remember hearing was in reference to the number of cases on a truck; I think it was the truck which received one hundred and forty cases. One man outside thought there were more on the truck than there was and I said that there were ninety-five on the truck. Someone inside of the car said "the agent was keeping count" and the party outside said no more. The man by the car was not checking, except that he had a manilla colored paper, lined with soft lead pencil, with spaces about an inch apart, and on that paper he had the names of the parties who were to get the whiskey and the amount each was to get. I could not distinguish the names or amounts because it was dark and I only had a lantern in the car. The fifth truck, No. 26577, received one hundred and forty cases. A police officer came up and asked who was in charge of the car and I said that it was consigned to Max Berkson. He asked me who Max Berkson was and I said that he was outside and for the officer to go and see him. The party who was standing outside *the* immediately took the officer and led him around to the north end of the car. The man
206 who led the officer away had a diamond pin in his tie and a diamond on his finger. The next truck, No. 2785, received one hundred and five cases. During all the time of loading, there were three or four men in the car and sometimes six or seven. I think one man stayed in the car all the time, but the rest of the

men would change as the trucks came and went. Three or four of the men who helped load the trucks wore working clothes, but the rest were dressed as if they were not used to that kind of work. The next truck, No. 50529, received one hundred cases. The next truck, No. 61075, received one hundred cases. The next truck, No. 26737, received ninety-five cases. The next truck, No. 49509, received one hundred cases. I did not notice any names on the trucks, except one, which bore some name like "Continental Candy Company." The fellows who were helping in the car went out with the last truck. A couple of other fellows were standing right outside the car door, but they left immediately. I could not give a description of them. Five or six men were standing a little distance from the car, arguing about paying a truck driver for his time or something, and as to which one should pay for it. I did not pay much attention to the conversation. Three cases of whiskey were opened in the car but I could not identify the persons who opened them. I am not sure if Berkson was in the car when the cases were opened, but I think he was. The whiskey from the cases was passed out to parties standing outside of the car and to the drivers of the trucks. The empty cases were left in the car until the last load, when they were placed on that truck. Mr. Gorman asked me for the keys to the office, saying that he had a friend with him who wanted to do some telephoning. I let him have the keys. I had left the permits all together on my desk and at that time Mr. Gorman's name was on that portion which is now shown to be torn off. I finished checking at about 9:50 P. M., day-light saving time. I returned to the office with my crow-bar, hammer and lantern. I found Mr. Gorman sitting at the desk using the telephone, about six feet from the desk where the permits were. He and the man with him left the office and I closed the office for the night and left for home.
207 I returned at eight o'clock the next morning and found that all of the permits were in the office, except that the signatures on both permits 1410, Government's Exhibits Nos. 6 and 7, were torn off. About ten days after the car was unloaded, a police officer, Judge, one of the defendants, came to see me and inquired about the unloading of the car. He asked me if the permit was O. K. and I told him that I thought it was and that I couldn't see anything wrong with it. Judge is the man I told that Berkson was outside.

Cross-examination.

By Mr. Houlihan:

Mr. Gorman signed the identification on the permit. I did not see Mr. Gorman around from the time we stayed to unload the car (7.35 P. M.) until he asked me for the keys. When I returned to the station after unloading the car, Mr. Gorman was in the office with a man about six feet in height, slim build and slightly gray hair, gray mustache, wearing a dark overcoat and colored tie, a white collar and a soft, dark hat. This man was leaning against the desk about a foot from the permit.

Cross-examination.

By Mr. Darrow:

Max Berkson did not wear glasses. I was very close to him several times. I could not say that the defendant Morris Gindich, was Max Berkson, the man at the car.

Cross-examination.

By Mr. Kirkland:

Railroad detectives O'Harra and Wissing were on the outside around the car while it was being unloaded. It took about two hours and twenty minutes to unload the car. During the unloading I was at first close to the door of the car, but as the cases were unloaded, I would get farther away from the door into the car. The man on the ground was not checking, he merely had a slip of paper stating how many cases were to go on each truck. One man stayed in the car from the first to the last, and I passed him a great many times. I had one lantern in the car. I saw this man's figure and features many times and got a good look at his face, but I did not hear him say much as he was chewing tobacco all the
208 time. (Whereupon, the defendant Heitler arose and faced the witness.) Mr. Heitler is not that man. (Whereupon, the defendant Perlman arose and faced the witness.) Mr. Perlman is not that man. (Whereupon, the defendant Greenberg arose and faced the witness.) The defendant Greenberg is not that man. The man who was in the car all the time did not have a diamond stickpin nor did he have a diamond ring on his hand, but I saw there a man with a diamond stickpin and diamond ring. The Government attorneys have never shown me Maurice Joy. The man who was with Mr. Gorman in the office was not Mr. Heitler, Mr. Perlman or Mr. Greenberg. I would not say that either Mr. Heitler, Mr. Perlman or Mr. Greenberg had been at the car that night. I did not see a man named Miller when in the Government Attorney's Office; nor one named Frank.

Redirect examination.

By Mr. Glass:

I saw some man walk away from the car with a police officer, and he later came back, but I did not hear him say anything.

Recross-examination.

By Mr. Kirkland:

The defendant Sergeant Judge, was the officer at the car that night.

MORRIS FRANK.

Direct examination.

By Mr. Glass:

My name is Morris Frank and I reside at 657 Wellington Street. I now run a coffe ship, but prior to the Prohibition Enforcement Act, the coffee shop was a saloon, run by me. The location of the coffee shop is 551 North Clark Street, Chicago, Illinois. I had been in the saloon business for twelve years. I know the defendant Nathaniel Perlman as Bob Perlman. He was a salesman for a glassware concern and used to sell me glassware. I did business with him for about a year and a half or two years. I know the defendants Michael Heitler and Mandel Greenberg. About nine o'clock in the evening, in the middle of the month of September, 1920, Perlman and Heitler came to see me at my place, 551 North Clark and offered to sell me a hundred cases of whiskey. Nothing was said about the price. Perlman spoke to me first. I said that
209 I couldn't handle a hundred cases so he went out and came back a week later. Michael Heitler was present. They were in the saloon about twenty minutes. When they came back a week later, Perlman spoke first and then Heitler spoke and, if I would buy one hundred cases of whiskey at $130 a case, they were going to guarantee me protection from the time it left the car until it reached my home. I gave them the order for one hundred cases of whiskey and they then said to me, "I will call you up and let you know when to come over and see me." This was around the 22nd or 23rd. Friday morning, October 1st, 1920, Perlman called me up and told me to come down with the money to his place of business. The second time they visited me, they told me that the whiskey was a high grade at that figure and they guarante-d me protection, that is, they told me if anything should happen they would make good. I told them the whiskey should be delivered to my house; no, to my brother's house on Clark Street. I think the number is 2547 North Clark Street, Chicago. After I got the telephone message on October first, I gave my brother $13,000 in currency and he went down there. Captain Ryan called me up and said that he wanted to see me, so I went to the Englewood Police Station about two o'clock in the morning on Sunday, and saw Perlman and Heitler, together with three or four men I did not know. Heitler came in while I was talking to Captain Ryan and told me, in Jewish, to shut up. I shut up and when Captain Ryan asked me to sign my statement I would not do it, so he locked me up. I got out on bonds the next day. I was in the Englewood Police Station all day and night in a cell. Michael Heitler was in the next cell to me. We had no conversation, except he told me to say nothing about the whiskey deal and that I had not bought any whiskey. When I came up from the cell, I saw Perlman. Heitler and I both got out of the station at the same time, but had no conversation. On

the second of October, in the morning, I went to see Heitler in Perlman's saloon, at Fifth Avenue and Washington. I had been there only once before, not in relation to this deal. I asked him what he was going to do about the whiskey I got held up for.

210 Heitler, Perlman and Greenberg were there. I went there to try to get my money back and told them so. All they said was, "We will try and straighten it out." They expected a carload of whiskey in about Friday and were going to give me some. After the trial at the Englewood Station, about October the 8th or 10th, Heitler, Perlman and Greenberg came to my place on North Clark Street and Heitler took me in the back room and gave me $7,000 in currency. He said, "That is all you are going to get." At the time I ordered the whiskey, they said to get my own truck and that they would call me up and let me know where to be.

Q. And where did they tell you to send that truck?

Mr. Kirkland: Who was it?
Mr. Glass: Who was it?

A. I couldn't answer this, because my brother, they told him.
Q. Well you called him up didn't you?
A. Yes, sir.
Q. Perlman?
A. Yes.

Mr. Kirkland: Don't lead him.

A. I believe he did say to be at 63rd and State, somewheres around there, with the truck.

I then sent my brother down with the money and the truck. I ordered the truck from the Novelty Candy Company. When Heitler spoke to me in the Englewood Police Station, he put his hand up to his throat. About a week after I got back the $7,000, Perlman and Heitler came to see me again and asked me if I had said anything to anybody. I told them I had not. When I went to see them on the second day of October, I asked for my money back. They said that if I had been held up by police, they would make good but if I had been held up by a regular holdup, they would not do anything for me. I asked how I could tell if it was a policeman, a Government man or a stick-up man and they said: "Well, we'll try and straighten it out."

211 Cross-examination.

By Mr. Kirkland:

I am commonly known around Clark Street as "Micky" Frank. I sell coffee and sandwiches in my coffee shop. I have one waiter and one bartender, and sell all soft drinks, but no "hard stuff." I lease the entire building. The upper part is sub-leased to one Jeffries, who runs it as a hotel. This hotel is not a house of prostitution. The coffee shop is not used by women to solicit men to go to the hotel. My daily receipts run between sixty and seventy dollars

a day just for coffee, sandwiches and soft drinks. The coffee shop keeps open until 1:00 A. M. After one o'clock, I do not run a hand book in the basement, nor a poker game in the hotel. My brother's name is Harry. I never went by the name of Knight and was not married under that name. It is not true, that in January, 1921, I was selling intoxicating liquor and running a saloon in connection with a house of prostitution.

Q. Well, if you were running a coffee house, why did you want a hundred cases of whiskey?
A. Why, I bought it on speculation.
Q. Speculation?
A. Yes, sir.
Q. Over the bar of the coffee house?
A. No, sir.
Q. What?
A. No, sir.
Q. Where were you going to speculate with it?
A. On the outside.

I once sold ten cases, since the Country went dry. I did not buy them from Mossy Joy. I do not know Maurice Joy, nor a man named Miller. I did not sell the ten cases over the bar in the coffee house, but I sold them on the outside. Of the hundred cases, twenty-five were for Kiser, twenty-five for Louis Greengaard, twenty-five for my brother, and twenty-five for me.

212 Q. And twenty-five you were going to keep, were you?
A. Yes, sir.
Q. To sell in your coffee house?
A. No, sir.
Q. What were you going to do with them?
A. Keep them.
Q. Oh, just for your personal use, is that right?
A. (No answer by the witness).

I intended to keep my twenty-five cases at my home, 657 Wellington. Kiser gave me $3,250 on Friday morning, the 1st of October, in my coffee house. Louis Greengaard was present and saw the money pass. I did not at any time pay any money personally to Michael Heitler, Mandel Greenberg or Nathaniel Perlman. Greengaard did not say anything when Kiser paid the money to me. Greengaard paid me $3,250 in my place about half an hour after Kiser paid me. When Kiser was paying the money, Greengaard said something about getting some whiskey. He had the money ready and knew he was going to get it; he didn't have the money ready, but he went for the money. I had known Kiser about a year, but had never before done business of this kind with him. I do not know what Kiser's business was and do not think he had any. I did not know him from the fact that he used to bring men to the hotel over the coffee shop. My brother, Harry Frank, and I are in partnership. He gave me $3,250.00 for twenty-five cases of whiskey. He paid me the money the same morning, but after Kiser paid me. I do

not remember whether or not my brother was present when Kiser and Greengaard paid me. My brother did not give me any money, but I drew $6,500.00 out of the bank and he knew I had it. My brother never spoke to me about Maurice or Mossy Joy, but he told me he saw him "out there" and heard his name mentioned. Captain Ryan called me up at two o'clock in the morning at my place of business. My night man had not shown up and I was waiting for him. When I made the statement to Captain Ryan in his office, the Captain's secretary took *to* down in shorthand. Neither
213 Heitler nor Perlman were present when I arrived. The Captain, the Captain's secretary and some other men were present when Heitler was brought into the room. This was about three o'clock in the morning. The room was about ten by twelve. At the time Heitler put his hand to his throat, Captain Ryan, his secretary, and two plain clothed men were present. Mr. Heitler, when he first came in, did not say to me "Do you say that I ever sold you any liquor?" nor did he say "Did I ever sell you any liquor?"

Q. Now isn't it a fact that when he was brought into that room that morning that he said, "Do you claim that I ever sold you any liquor," and didn't you answer "No, you did not." Now isn't that true?

A. I don't remember that.

Q. You don't remember?

A. No.

Q. You have got a pretty good memory, haven't you?

A. (No answer by the witness).

Q. Haven't you?

A. Well, I guess——

Q. What?

A. I don't remember that.

Q. You don't remember?

A. No.

While I was in the cell, no police officer or other person came to question me about the deal. Some Government men came after me and took me to Mr. Kelly's office. I informed Mr. Kelly that I was going to get my lawyer, Timothy Fell. Later, I met Mr. Kelly again and Mr. Fell went into his office. I do not know what they said. When Mr. Fell came out, we left the building. About a week later, Mr. Fell and I went back and Mr. Fell saw Mr. Kelly while I waited outside. When Mr. Fell came out, we both left. I didn't tell Mr. Kelly anything the first or second time I went to see him. After Mr. Fell saw Mr. Kelly the third time, he came out and told me to tell what I knew. Mr. Heitler and I were
214 in the same cell at the Englewood Station about half an hour and then we were put in different cells. When Mr. Heitler told me in Yiddish to keep still, I became afraid of him. I did not tell Captain Ryan or his secretary or any of the policemen that I was afraid of him. After I was taken upstairs and after Mr. Heitler had gone, I did not tell the lieutenant that I was willing to sign the statement now that Mr. Heitler had gone, nor did I say

anything. I met Greenberg for the first time on October 1st, 1920, had not known him before that and had had no business dealings with him. I had known Perlman, because he used to sell glassware to me, but I had had no business dealings with him for a couple of years. I had had no business dealings with Heitler before October 1st, 1920. Heitler and Perlman came to my place of business in the middle of September. I sold ten cases (heretofore mentioned), making the sale at my home. I sold these cases to different parties; I sold them to one party. I do not know the purchaser's name, but happen to meet him on Clark and Madison Streets. I did not know where he lived.

Q. Do you know where his place of business was?

The Court: I think you have pursued that far enough.

Mr. Kirkland: I beg pardon?

The Court: I say, I think you have pursued that far enough. We are not trying that case. As impeachment he has admitted that he sold liquor. Now the name and the amount and the person to whom he sold it at that time is not relevant to the issue that we are trying.

Mr. Kirkland: Except that it is the contention of the defense that these men were in the liquor business.

The Court: That who was in the liquor business?

Mr. Kirkland: This man.

The Court: Well, he admits that he sold liquor.

Mr. Kirkland: At one time. Well, I wont press it any further, is that is your Honor's feeling.

The Court: I don't believe we ought to get into foreign issues here.

215 Mr. Kirkland: All right, if that is your Honor's feeling about it. I can have an exception to your Honor's ruling that I should not continue the cross examination further along that line?

The Court: Yes.

To which ruling of the Court the defendants, and each of them, by their respective counsel, then and there duly excepted.

I bought these ten cases from Perlman, but do not remember the month in which I bought them, nor do I know where they came from. I had not told Perlman that I wanted any more whiskey, nor had I told Heitler, nor had I sent word to Perlman or Heitler that I wanted any more whiskey, but they appeared at my place without having told me they were coming and without having made an appointment. This was about nine o'clock in the evening. They stood up against the bar and talked to me. We did not go in the back room. About five or six other men were standing about three or four feet away from us. I cannot remember whether Mr. Heitler or Mr. Perlman spoke first, but they asked me if I was on the market to buy some whiskey and I said that I did not care to buy any at the present time.

Q. Did they mention the price?

A. No. Not the first time. They did not. I told them I would not take it and they said that they would see me again. I refused because I could not handle that many cases, not because I was afraid of committing a crime. They did not mention any price the first time. They did not lower their voices, nor tell me to keep quiet about this liquor deal. After they went out, none of the men standing at the bar asked me where they could get liquor. They came back in about a week, but I had not telephoned or sent word to them that I could use the whiskey or to come back. I had not gone out during that week to see if I could find purchasers
216 for the liquor, I had not talked to Greengaard, Kiser or my brother about it during that week. Neither my brother, Greengaard nor Kiser was present the first time Heitler and Perlman came to my saloon, nor can I name anyone who was present. In the week which intervened between the first and second visits, I did not send word to Mr. Heitler or to Mr. Perlman in any way that I could handle a hundred cases. I had not given the matter any further thought between the first and second visits. Mr. Heitler and Mr. Perlman came the second time, but Mr. Greenburg was not with them. Neither my brother, Greengaard nor Kiser was present, but two or three other people were in the coffee shop at the time. I have no particular way of fixing the time as the 22nd or 23rd of September except that it just happened to be a week before they called me up on Friday, October 1st. When Mr. Heitler and Mr. Perlman came in, they stood at the bar and talked to me in a general conversational tone. I do not remember which one spoke first. The other men were standing three or four feet away. I stayed behind the bar and did not come around in front. My brother was not there. The second time, they asked me if I was on the market to handle one hundred cases at $130 per case with protection guaranteed. I said "All right." I changed by mind about buying because I had spoken to the rest of the fellows and they each took twenty-five cases.

Q. You just told me a few minutes ago that you didn't talk with anyone during that week about it, Greengaard, Kiser or your brother. Now which is the truth?

A. The second week.

Q. Between the time they made their first visit, the time you claim that Heitler and Perlman came to you in the middle of September, and the second visit, which you say was about the 22nd or 23rd of September, didn't you just tell me a few minutes ago that during that week you didn't talk with either your brother, Greengaard or Kiser about it?

217 A. I believe I did talk with them.

Q. You don't think you did? Well, now, you say you did talk to them during that week, do you?

A. (No answer by the witness.)

Q. Between the first visit now—I don't want to mix you up, let us get this straight. The first visit you say was about the middle of September?

A. Yes, sir.

Q. And the second visit about the 22nd or the 23rd?

A. Yes, sir.
Q. Of September?
A. Yes, sir.
Q. Now you know what I mean when I speak of between those two visits, don't you?
A. Yes, sir.
Q. Did you talk with Greengaard between those two visits?
A. I think I did.
Q. Well, did you?
A. I did.
Q. What did you say to him?
A. I asked him if he could use any whiskey.
Q. And what did he say?
A. He said yes.
Q. How many cases did he agree to take?
A. Twenty-five.
Q. At how much?
A. At the same price.
Q. What price?
A. $130.00.
Q. Did you agree to sell it to him, did you agree to sell him twenty-five cases at $130.00?
218 A. What?
Q. Did you agree to sell him a case of twenty-five at $130.00?
A. I will agree if he will take part of a hundred cases.
Q. You agreed during that week between Heitler and Perlman's first and second visits, you agreed with Greengaard to sell him twenty-five cases at $130.00 did you?

Mr. Glass: I object to that. His statement is that he didn't agree to sell, but they——

Mr. Kirkland: Well, I am asking him if he did.

Q. Did you agree to sell to him?

The Court: It is cross examination.

Mr. Kirkland:

Q. Did you agree to sell to him, to Greengaard, at $130.00?
A. It was his own suggestion.
Q. Well, all right. Did he agree to buy it from you?
A. Not from me.
Q. What?
A. Not from me.
Q. Well you were the man that was going to get it, weren't you?
A. Well, he was in on that.
Q. Well, what did you tell him you could get the liquor for in that week between those two visits?
A. $130.00 a case.
Q. How did you know that he could get it for $130.00 a case when neither Heitler or Perlman said anything about the price on their first visit?

A. The second visit.

Q. Well now, which was it? When did you talk with Greengaard or Kiser—did you talk with them before or after the second visit?

219 A. After the second visit, I guess.

Q. All right. Then between the two visits, between the first visit and the second visit you did not mention to Greengaard anything about your talk with Heitler or Perlman or about this liquor, did you?

A. Between when?

Q. You say that Heitler and Perlman came to your saloon?

A. Yes, sir.

Q. It goes by the name of "The Tile Bar", doesn't it?

A. Yes, sir.

Q. They came to your place of business about the middle of September and asked you if you were on the market and you said no, you couldn't handle that many cases?

A. Yes, sir.

Q. Then you say they came again about a week afterwards or the 22nd or 23rd of September?

A. Yes, sir.

Q. Now, between those two visits did you mention anything to Greengaard about Heitler and Perlman wanting to sell any liquor?

A. I did.

Q. You did?

A. Yes.

Q. What did you say to him?

A. I asked him if he could use any liquor.

The Court: A little louder.

A. I asked him if he could use any liquor.

Mr. Kirkland:

Q. And what did he say?

A. He said he could.

Q. And what did you say?

A. I said "all right, we will get it".

220 Q. Was anything said about the price?

A. He asked me how much and I told him.

Q. What did you tell him?

A. I told him $130.00 a case.

Q. Where did you learn that you could get it for $130.00 a case when you just told us that at the first visit neither Heitler or Pearlman said anything about the price?

A. They didn't say anything about the price.

Q. Well then, how did you know that you could get it for $130.00?

A. The second time.

Q. But you had a talk with him before the second visit, didn't you?

A. Yes, sir.

Q. Well, when he said to you——
A. We didn't talk about the price the second visit, he just told me he could use it.
Q. He just what?
A. He just told me he could use some whisky.
Q. He just told you that he could use some whiskey?
A. Yes, sir.
Q. Now, didn't he know how much it was going to cost him?
A. I told him it was going to be between $125.00 and $130.00 a case.
Q. What I want to find out is how you knew, Mr. Witness, that it would cost him between $125.00 and $130.00 a case when you hadn't said anything to him about the price?
A. Well, they had mentioned it to me.
Q. What?
A. Perlman and Heitler told me it would be around that much.
Q. When did they tell you that?
221 A. When they were over to see me.
Q. Which time?
A. Even the first time.
Q. Well didn't you just say a few minutes ago that on their first visit nothing was said about the price? Now didn't you say that?
A. I asked him how much will it amount to and he says between $125.00 and $130.00 a case.
Q. Say, Mr. Frank, didn't you, in answer to my questions this morning, tell the Court and Jury that at the first visit nothing was said about the price?
A. (No answer by the witness.)
Q. Now didn't you say that?
A. (No answer by the witness.)
Q. Didn't you?
A. (No answer by the witness.)
Q. What?
A. I believe I did.
Q. Now you say that there was something said about the price, do you?
A. Yes, sir.
Q. All right. What did they tell you on the first visit about the price?
A. I asked them about how much it will be and they said it will be between $125.00 and $130.00 a case.

I talked with my brother between the two visits of Mr. Heitler and Mr. Perlman and told him it would cost between $125.00 and $130.00 a case. I bought my part as a speculation.

Q. What do you mean by "speculate on your share"?
A. Twenty-five cases.
222 Q. Were you going to sell it to someone else?
A. No, sir.
Q. Well, how would there be any speculation there, how was there any speculation about that?

A. Well I was going to keep it for my own use.

Q. Now, you say you were going to keep it for your own use, didn't you?

A. Why I was going to keep it for speculation for my own use.

Q. Now, just what do you mean by that?

A. Keep it for my own use.

Q. For your own use.

A. Yes, sir.

Q. Were you going to sell it?

A. No sir.

Q. If the price went up?

A. No sir.

Q. And you were selling it to Greengaard at the same price you were getting it for, $130.00 were you?

A. (No answer by the witness.)

Q. That is right, isn't it?

A. Yes, sir.

Q. So there was not any speculation about it at all, was there?

A. No, sir.

Sometime after the hearing at the Englewood Police Station, Heitler, Perlman and Greenberg came to my place of business. Heitler took me in the back room and gave me $7,000, of which I gave Greengaard $1,575 and the same amount to Kiser. I deposited the rest in the bank. I gave Greengaard and Kiser some money back. I did not receive a cent from Greengaard or Kiser for the purchase of any liquor, but my brother did, they gave it to him. I said on Saturday that one of them, Kiser or Green gaard, paid me
223 first. They paid it to my brother in my presence. Up to this time, I had not had anything to do with Mr. Greenberg in regard to this deal. I called Perlman by telephone on the 1st of October, but he was not in. Perlman called me up Friday morning, the 1st of October, between ten and eleven o'clock. I am positive it was the first of the month from some of my own business dealings. I sent my brother to Perlman's saloon. I collected the money from Greengaard and Kiser that morning between nine thirty and ten, before Perlman telephoned me. They had told me, the second visit, that the stuff would be in by the first of the month. I now say that Perlman told me the stuff would be in by the first of the month. I collected this money on the morning of the first without having heard from Perlman. Then Perlman called me up and told me to send the money over. I did not go to Perlman's saloon on Friday, but sent my brother. I did not tell Captain Ryan that Perlman and Heitler had come to my place of business. (At this point, Defendant Heitler's Exhibit No. 1 of February 21st, 1921 was handed to the witness.) I have read Defendant Heitler's Exhibit No. 1 of February 21st, 1921 and it contains the statement I made to Captain Ryan, the questions he asked me and the answers I made to him. Whereupon Defendant Heitler's Exhibit No. 1 of February 21st, 1921, was offered and received in evidence, and was and is in words and figures as follows, to wit:

224 DEFENDANT HEITLER'S EXHIBIT NO. 1 OF FEBRUARY 21, 1921.

Oct. 3, 1920—3.30 a. m.

What is your name? A. Michael Frank.

Where do you live? A. 551 N Clark Street, phone Superior 338.

What is your business? A. Saloon.

Did you buy any whiskey from any body lately? A. Yes from Mike the Pike.

How much did you buy? A. 105 cases last Thursday morning.

Where was the deal made? A. At Pearlman's place at Wells and Washington streets.

Who was present? A. Pearlman, Mike the Pike and myself.

When did you pay them for the whiskey? A. Thursday morning.

How much did you pay? A. $13,650.00.

What kind of whiskey was it? A. "Grand Dad."

Did you see the whiskey? A. No.

Who was to deliver it? A. They were supposed to deliver it.

Where was the whiskey to be got at? A. 85 street somewhere at a railroad yard.

Who went out there? A. Two other fellows, Louis Greengaard and my brother Harry Frank. His address is 2547 N Clark St. Phone Diversey 1916.

Any body else? A. A man they call Kaiser.

Did they get the whiskey? A. Yes.

Anything happen? A. They got stuck up at 48th and State St; three or four fellows stuck them up.

Have you heard that it was policemen who stuck them up? A. They said it was police officers; they showed stars and pulled a magazine gun out. They took the whiskey and went away. They took the truck too.

Was the truck found? A. Yes at 55th and Prairie avenue about 10 o'clock.

Have you received any of the whiskey? No.

225 These questions were asked by Captain Ryan and answered by me before Heitler came into the room and up to that time Heitler had not put his hand up to his throat or threatened me. I was not in Perlman's saloon on Thursday, as stated to Captain Ryan I did not tell Captain Ryan about Mr. Perlman and Mr. Heitler coming to my place in the middle of September, or on the 22nd or 23rd, or that they called me up on Friday morning, for the reason that Captain Ryan did not ask me. I told Captain Ryan all that I knew. On Sunday, October 3rd, I knew just as much about this matter, as to all things which took place before Sunday, as I know today. Perlman called me up on Friday. Everything was not exactly fresh in my mind at that time. I do not remember if things were as fresh in my mind two days after Friday as they are today. I sent $13,000 over to the saloon. There is no more reason why I

should tell the truth here than there was at the police station. I am telling the truth here. I did not tell Captain Ryan that the statement I made was wrong or incorrect, but I simply refused to sign it.

Q. Mr. Frank, you now say that Kiser paid the money to your instead of paying it to you. I want to see if I cannot refresh your recollection. Do you remember this question being put to you by me on Saturday morning in reference to the payment of money to you by Kiser and Greengaard:

"Q. Was your brother present in your coffee house when Kiser paid you, and didn't you answer: "Well, I don't remember that." And was this question then put to you: 'Well was it before or after Kiser paid you that your brother paid you?' 'Well, after I guess.'
"Q. How long after?
"A. About an hour after.
"Q. Was Greengaard there?
"A. No, sir.
"Q. Was your brother present when Greengaard paid you?
226 "A. I don't think he was.
"Q. You don't think he was?
A. No."

Now, which is correct?
A. I don't remember that.
Q. You don't remember?
A. No, sir.
Q. Well, do you say now that your brother got the money from Greengaard and Kiser or did you get it?
A. I don't remember that.
Q. You don't remember that?
A. No.
Q. Why, do you have dealings in sums of money amounting to $3,250.00 so frequently in your coffee shop that you cannot remember whether Greengaard paid it to you or whether he paid it to your brother?
A. I don't remember.
Q. What?
A. I don't remember that.
Q. Have you ever had a business transaction in the last year where any money than that was involved?
A. No, sir.
Q. That is the biggest one you have had in the last year, isn't it?
A. Yes, sir.
Q. Now, do you remember whether Greengaard paid you anything?
A. I know he paid some money, but I don't remember how the money was paid.
Q. Isn't it a fact that Greengaard never paid you a cent in this liquor deal, isn't that a fact, that he never paid to you one cent of money?

227 A. I don't remember that.

Q. Isn't it a fact that Kiser in this deal never paid you a cent of money?

A. I don't remember that.

I do not know Mossy Joy and he was not the man who gave me back the $7,000. It was about nine o'clock in the evening, on the 8th or 10th of October, when Heitler, Perlman and Greenberg came to my place. When Heitler came out of the saloon, they all went right out and neither Greenberg nor Perlman said anything to me that night, nor did I say anything to them. I did not say a single word to Heitler in the back room. He simply walked in, handed a roll of bills, said that that was all that I was going to get, and walked out. I am not sure that this was in the month of October, but I think it was. I cannot say whether or not it could have been in the month of November. Between October 2nd, the date of the hearing at Englewood Station, and the night Heitler gave me the money back, I had not communicated with him or tried to get my money back. I had last seen Greenberg on Saturday morning, the 2nd of October, in Perlman's saloon, but had had no conversation with him. I never spoke to Greenberg about this deal, nor did he ever speak to me. Greenberg could not see, from where he was, Heitler paying me any money. I believe that Heitler paid the money back on the 8th or 10th of October. I do not remember whether or not it was before or after Thanksgiving, but I believe it was before Christmas, although I am not sure. When I went to Perlman's saloon Saturday morning, October 2nd, quite a few people were there. I did not hear the name of "Joy", nor did I hear anyone accuse Heitler of having held up the trucks. I talked to Heitler and Perlman on the settee. A crowd was in the saloon getting lunch. No effort was made by Perlman or Heitler or by me to lower our voices. I was there about fifteen minutes. My brother ordered the truck which was sent to get the whiskey. I drew the $6,500 out of Foreman Bros. Bank, but I do not remember what day of the month it was and am not sure that it was Friday, October 1st. I have been in the saloon business at my present place for seven years. I was in the saloon business two blocks south
228 for five years. Before that, I ran a saloon for five or six years on the West side. During all the twenty-six or twenty-seven years I have been in Chicago I have run a saloon.

Redirect examination.

By Mr. Glass:

They called and gave me the $7,000 about a week after the hearing at the Englewood Police Station. When I made the statement at the Englewood Police Station, I had not seen my attorney, Mr. Fell. The settee in Perlman's saloon is up against the wall, about four feet from the bar. The saloon is on the southwest corner. About two steps lead down into the saloon from the street.

HARRY FRANK.

Direct examination.

By Mr. Glass:

My name is Harry Frank. I live at 2547 North Clark Street. I am thirty-three years old. My brother, Morris Frank, and I run a coffee shop at 551 North Clark Street. I have been in business with my brother for ten years. I met Mr. Greenberg once. I met Mr. Heitler in Perlman's place on October 1st, 1920, when I paid $13,000 to Mr. Perlman for 100 cases of whiskey. I did not see anyone when I paid the money to him. Some of the money belonged to me, some to my brother, some to Greengaard and some to Kiser. When I paid the money to Mr. Perlman, between eleven and twelve o'clock, Mr. Greengaard was present. Mr. Perlman said "As soon as I get the car in I will call you up and let you know what time to be there and get your goods." I was in saloon about ten minutes. I then went back to the place and about two or two thirty Perlman called up my brother. I went out to 61st and State Streets to meet Perlman, but he was not there. I then went to 63rd and State Streets and Mr. Heitler was there. I asked Heitler when we were going to get our whiskey and he said "in half an hour." No one was with me at the time. I stood around there for two or three hours. About nine o'clock, Perlman came along and said to go to 79th and State Streets and wait until he got there.

229 I went there with my truck, following it in a machine. We stood there for half an hour. Then Mr. Perlman came and said to go to 81st and Vincennes, where I would find a car from which I would get my whiskey. Greengaard was with me. I entered the railroad yards and arrived at the car between ten and eleven o'clock. When I got to the car, I saw "Mr. Perlman and Mr. Heitler and Mr. Greenberg—Greenbaum—whatever his name is—Greenberg, I think". I was standing on the street near the railroad car with Greengaard.

Q. Did you speak to anybody there?
A. When we got to the car, I spoke to Mr. Perlman.
Q. What did he say?
A. He said "Go and get your stuff there."

I got a hundred cases. Perlman said nothing, except "Go get your stuff". Mr. Perlman gave me the hundred cases. Greenberg was there and had a piece of paper in his hand. He said "Mickey Frank next with one hundred five cases; Mickey Frank was first with a hundred five cases,—one hundred cases." After leaving the car, we drove north on State Street. Greengaard and I were following the truck in a machine. Kiser was driving the machine, which was his Ford. He had been with us all the time. Between 48th and 49th Streets, four men ran up along side the truck in a machine, held up the driver and pointed their guns at me when I

came up. I said I was not with the truck and went away. The four men took the truck away from the driver and went back south. I tried to follow the truck, but lost it at 50th and Wabash. I then went back with Greengaard and Kiser to 81st and Vincennes, where the car was unloaded, and saw Mr. Heitler and Mr. Perlman. I told Mr. Heitler we had been held up. A fellow by the name of Joy was hollering that he had been held up, but no one else was there, except Mr. Heitler and Mr. Perlman. Mr. Heitler told me that if we had been held up by Government men or policemen, he would give me the money back. I said that I did not know who they were, and he told me to see him the next day at Perlman's place, Washington and Fifth Avenue. I then went back to my place and told my brother about it. I next saw Heitler, Perlman and
230 Greenberg at my place a few days later, in the evening between six and seven. They talked to me, but not about this deal. I stood back of the bar. My brother was there talking to Mr. Perlman and Mr. Heitler. Five of the cases belonged to some friend of Mr. Heitler, but I do not know who he was. The truck driver told me there was five cases more going and he was supposed to take it somewhere. I never saw Heitler, Perlman or Greenberg after they came to my place.

Cross-examination.

By Mr. Kirkland:

I did not go into the back room or speak to Mr. Perlman or to Mr. Heitler, after he came out of the back room, in regard to the whiskey or paying back the money.

Q. What were you going to do with the hundred cases?
A. I was going to buy it for a speculation.
Q. Speculation?
A. Yes.
Q. What do you mean by speculation?
A. Sell one or two cases at a time.
Q. You were going to buy this and sell it at a higher price than what you bought it?
A. Yes, sir.
Q. Your brother and you—you and your brother were in partnership?
A. Yes, sir.
Q. That was what you intended to do with how much of this hundred cases?
A. Yes, sir.
Q. How much of the hundred cases were you going to speculate on?
A. We only got twenty-five apiece.
231 Q. Were you going to speculate on fifty?
A. Yes, sir.
Q. Where were you going to keep these fifty cases?

A. I was going to keep them at my house and he was going to keep them at his house.

Q. Why were you going to take twenty-five cases to his house if you were going to sell the whole fifty if you got a chance?

A. We were not going to sell them all at once.

Q. Couldn't you sell them all from your place?

A. Sold one case at a time or two cases.

Q. As a matter of fact, you were going to buy that liquor and sell it right over your coffee house bar, weren't you? That is what you intended to do?

A. I was going to sell it by the case. I was not going to sell it by the drink.

Except for this transaction, I had never dealt in liquor since the Country went dry. I was not at the Englewood Police Station on Sunday morning, October 3rd. I did not report the loss of the truck load of liquor to the police. I did not ask my brother to report it. Here, on the witness stand this morning, is the first time I ever talked to anyone, except my attorney, Mr. Timothy Fell, or told what I know about this deal. A few days later, Mr. Fell, my brother and I went to see Mr. Kelly, but I did not tell him anything. Mr. Fell, my brother and I made two or three visits to Mr. Kelly. Each time, Mr. Fell left us outside while he went in to talk to Mr. Kelly. Before I came into this courtroom to testify, I had never spoken to anyone, except Mr. Fell, about this case. I have never been told that I would not be prosecuted.

Mr. Kirkland (addressing Mr. Glass): Will you let me have the statement he made in your office?

232 Mr. Glass: He didn't make any statement. I made a memorandum of what his statement was.

On Friday, October 1st, I went to Perlman's saloon. My brother had told me, just the day before, that he was going to buy one hundred cases of whiskey from Perlman. I learned about this whiskey deal for the first time on September 30th. My brother had never spoken to me about it before that, nor had I talked with Greengaard or Kiser about it before that time. Kiser and Greengaard paid the money to me Friday morning and I had not collected any money from them before that. I had known Kiser for about three months, but had had no business dealings with him. My brother and Greengaard were present when Kiser paid me the money. Greengaard paid me also. Kiser often came into my saloon and Greengaard used to come in every day.

Q. What did you do with this $6,500 that you got from Greengaard and Kiser? When they gave it to you what did you do with it?

A. I went down and I drawed money from Foreman Brothers and took it down to Mr. Perlman and gave it to him.

Q. You went to the bank and drew out the money?

A. No, my brother did, he got the money there and he came back and gave me the money to take it over there.

My brother drew the money out about ten o'clock. Mr. Perlman had called me up in the meantime. My brother told me to take the money and give it to Mr. Perlman for one hundred cases of whiskey. I got to Perlman's place between eleven and twelve. I spoke to Mr. Perlman. Mr. Greenberg was not there, nor did I know him at that time, nor had I ever seen him in my place of business. Mr. Heitler came in about five minutes after I had paid the money. When I paid the money, Mr. Perlman, Greengaard and I sat in a booth. It was between eleven and twelve o'clock on October 1st. I had never paid out that much money before without taking a receipt for it, but I did not get a receipt for this money, nor did I ask for one.

233 My brother did not tell me anything about this liquor deal until the day that I went over and paid the money; he only told me just a few days before. He had never gone into a deal of that size, $6,500.00, before without telling me about it before he made the agreement, but whatever he does is all right. He never bought that much before. I told Mr. Perlman we had the money for the one hundred cases. We sat down in the booth and I gave him the money. Greengaard said nothing while the money was being counted. Mr. Greenberg was not there. Mr. Heitler came in after the money had been counted and given to Mr. Perlman. I paid $13,000 and did not pay $13,650. I was there about ten minutes. I merely said, "How do you do" to Mr. Heitler. Mr. Perlman said he would call me up. Greengaard and I returned to my place and, after the telephone call, about 2.00 P. M., I went and got a truck. We started off with the truck about three o'clock and went to 61st and State Streets. I did not see Mr. Perlman there. I saw Mr. Heitler at 61st and State Streets between three and four o'clock. I saw Heitler at 63rd and State, but nobody was with him. I saw Greenberg at 61st and State, but did not know him at that time. He was standing all alone on the elevated. I cannot remember how he was dressed. He had an overcoat on, but I cannot remember whether it was light or dark. He did not wear glasses or gloves. I do not know what kind of a hat he had on or what color his clothes were and cannot remember whether it was a soft or stiff hat. I did not see Greenberg at 61st and State Street, but was introduced to him at 63rd. Greenberg was standing there all alone. Mr. Greengaard introduced him to me and said " Meet Mr. Frank, Mr. Greengaard—Greenberg." I did not say anything to Greenberg or he to me about whiskey. This was about four thirty. I waited at 63rd and State Streets about three hours and then went to 79th and State, getting there about nine thirty. I remained at 79th and State about half an hour. I didn't see Mr. Heitler or Mr. Greenberg, but Mr. Perlman came up in the machine and told us to go to 81st and Vincennes. I was standing on the street with Greengaard and Kiser. About ten o'clock, I went to the car at 81st and Vincennes and saw Perlman there. I saw a man there with a lantern.

234 Perlman did not get up into the car, but stood near my truck, about five or six feet from the man with the lantern. Heitler was around the car and trucks.

Q. Were they helping to load?
A. No sir.
Q. Neither Heitler nor Perlman were helping to load?
A. No sir.

Heitler got close up to the man with the lantern, but I did not see him talking to him. I did not see Heitler get into the car at any time. I saw Greenberg there, standing near the car. He had a piece of paper in his hand and was checking off. He said "Mickey Frank one hundred five cases next." I saw one man inside the car with the lantern, but I do not know how close to that man Greenberg came as Greenberg was not inside the car. I had never seen Greenberg in my life before that night nor had I spoken to him. A day or so later, I told my brother that the man with a piece of paper was there and his name was Greenberg and he told us to take one hundred five cases. I was only to get one hundred cases, but I took the one hundred five. I did not say that it was wrong and that I only paid $13,000 for a hundred cases, because the five cases, I understood, had been paid for by somebody else. Perlman told us, I guess the same day. He called me up and said "There is five cases more for some other fellow." This was about two thirty, right after the man paid for it. He did not telephone me, but telephoned my brother.

Q. Now as a matter of fact, isn't this the first time that you have ever thought of that extra five cases? Isn't this the very first time you have ever thought of any explanation for that five cases?

Mr. Glass: I submit——

A. There were five cases that did not belong to me.

Mr. Glass: I submit he testified to that in his direct examination.

Mr. Kirkland:

Q. Isn't this the first time that you have ever thought of
235 that explanation for the extra five cases?

A. I didn't pay for them, I didn't know anything about them.

Q. No, but isn't this time right here now, the first time that you have ever thought of that explanation for the extra five cases?
A. Well I——
Q. What?
A. I know it was one hundred five cases.
Q. That is all you can say?
A. That is all I can say.

My brother, and not I, made all the arrangements with the truck driver. It was about ten o'clock when Greenberg said "Mickey Frank next, one hundred five cases." After the holdup, I returned to the car at 81st and Vincennes. I saw Mr. Heitler and Mr. Perlman at the car, but not Mr. Greenberg. There were no trucks left at the car at that time. I saw Joy at the car. This was about

eleven o'clock. I left the car before Joy. I do not know who left first, but I know I left and went back to my place. A few days later, Mr. Heitler and Mr. Perlman came to my place. Mr. Greenberg was not with them. I was never in Louisville or Peoria.

Redirect examination.

By Mr. Glass:

I believe that at the time the car was being unloaded, there was one lantern outside the car and one inside.

LOUIS GREENGAARD.

Direct examination.

By Mr. Kelly:

My name is Louis Greengaard and I live at 644 Aldine Avenue. I have known the defendant Nathaniel Perlman as Bob Perlman. I met Mr. Perlman for the first time in his place of business on Washington Street, about eleven o'clock, on the last day of September or the first day of October, when Harry Frank and I went
236 there to put up some money for whiskey. I saw Frank pay the money to Perlman. I did not see Heitler there. I was in the saloon about five minutes. I then went back north and stayed around a couple of hours. I then went to 63rd and State Street with Harry Frank. I saw Greenberg at 63rd and State and talked to him. He said that we would have to wait, because they were switching the car. Perlman told us to go to seventy something street, where we stayed about half an hour or an hour. From there, we went south some place under a viaduct. Perlman gave directions both times. I saw Heitler, Perlman and Greenberg at the car. The freight car was alongside of the street and they were standing on the street. I did not talk to either of them. I was standing alongside of the truck. When we were loaded, we went back north. At about 50th Street, the truck stopped and Harry Frank went up to it. He returned and said, "They stuck them up." We then went back to the car. I saw Heitler, Perlman and Greenberg there. I was standing right alongside of Harry Frank while he talked to them. I think it was Mr. Heitler who said to come back the next day and they would fix it up. Then we went back home. Mickey Frank asked me to go into the proposition with him. I paid $3,250 to Mickey Frank for twenty-five cases on October 1st, 1920.

Cross-examination.

By Mr. Kirkland:

At that time (September 30th) I was working as a waiter and bartender for my brother at thirty dollars a week. Before that, I was in the saloon business at 606 North Clark Street. The first time I heard about this liquor deal was when Mickey Frank asked me to

go in with him, on the evening of September 30th, or the morning of October 1st. When I paid the money to Morris Frank, his brother was present. I got this $3,250 out of a safety deposit vault where I had kept it for a couple of years. I got half my money back. Kiser did not give Mickey Frank any money in my presence. I was not in the booth at Perlman's place with Mr. Perlman and Harry Frank about noon, but was at the bar. About a dozen people were in Perlman's saloon at this time, standing at the bar,
237 about five or six feet from the booth. I saw Harry Frank give Perlman a bundle of money. I believe I heard Perlman tell Frank to go back to his place, that he would call him up. I did not see Greenberg in there, nor did I see any money given to Greenberg or Heitler. I do not remember seeing Heitler there, although I have known him by sight for five or six years. Harry Frank and I walked out together, but I did not hear him speak to Mr. Heitler. On Saturday, the day following the holdup, I went to Perlman's place with Mickey Frank.

Q. What did you intend to do with that twenty-five cases?

A. Well I was going to hold it in case of sickness or something like that.

Q. Sickness?

A. Yes.

Q. Medicinal purposes?

A. Yes.

Q. You were not running a hospital or a sanitarium, were you?

A. No, sir.

Q. And you are a single man?

A. Well, I thought it was a good buy.

Q. Well you were going to sell it, weren't you?

A. I don't know what I would have done with it.

Q. Well a minute ago you were going to hold it for sickness, and now you say you don't know what you would have done with it.

A. Well you asked me if I was going to sell it. Maybe I would

Q. Maybe you would?

A. Yes.

Q. Well you don't mean that you invested $3,250 in whiskey just because you feared you were going to be sick some day, do you?

A. Well I might have used some myself and I might have sold some.

Q. Have you been around soliciting anybody to sell that to?

A. No, sir.

238 Q. You hadn't any idea where you were going to sell it?

A. No, sir.

Q. You didn't intend to leave $3,250.00 tied up in liquor, did you?

A. Well, I said maybe I would have sold it. It was an investment as far as I was concerned.

I did nothing about the money after Saturday, nor did I ever go to Heitler, Perlman or Greenberg again. I was arrested and at first denied knowing anything about this deal. I was put under $5,000

bonds by Commissioner Mason and am now out on bond. My attorney, Mr. Fell, took me to see Mr. Kelly. Mr. Fell went with Mickey Frank, Harry Frank and myself to see Mr. Kelly three or four times. I did not ask Mr. Fell if he had made any arrangement as to whether or not I was to be prosecuted, but left it entirely to his judgment, and he simply told me to tell Mr. Kelly what had happened. I do not know Mossy Joy or a man named Miller. I heard Mickey Frank and Harry Frank make their statements to Mr. Kelly. I met Kiser for the first time when Kiser, Harry Frank and I went out Friday in Kiser's Ford. When I got to the car, I was standing five or six feet from it, but heard nothing said. I first went to 63rd and State Street. I saw Greenberg there, standing on the elevated road or viaduct. I did not hear Harry Frank say anything to him. I might have introduced Harry Frank to Greenberg if they had not met, but I am not sure. I saw Perlman at 63rd and State Street but did not see Heitler. I then went to 72nd and State, and from there to the car. I saw Heitler, Perlman and Greenberg five or six feet from the car. They were not doing anything. Neither one of them had anything in his hand. I did not hear Greenberg say anything. When our truck backed up against the car, Heitler, Perlman, Greenberg, Harry Frank and I were all standing together, but I did not hear Greenberg say anything that I remember. Three or four people were inside the car, but I do not know how many lanterns were in the car. I did not see anybody on the ground checking the stuff. I did not
239 see Greenberg standing at the door of the car checking it out. When the truck was run up against the car, I did not hear Greenberg say anything. I was standing there talking to him. I was probably with Harry Frank all the time, but I might have walked away for a minute or so. I don't remember. We got one hundred five cases. Mickey Frank told me before we left that five cases more were to be put on. I first saw Greenberg about three in the afternoon on Friday at 63rd and State Street and saw him at the car about nine o'clock. Upon returning to the car, after the holdup, about ten o'clock, I saw Heitler, Perlman and Greenberg there. I had seen Perlman at 63rd and State Street about eight-thirty or nine o'clock, in his machine. I do not know what kind of a car it was. The Franks and I are close personal friends and I go to their saloon every day and sometimes two or three times a day I went to Perlman's place about noon Saturday and saw Heitler, Perlman and Greenberg, but did not see Joy. The place was crowded. I did not talk to Greenberg, but Mickey Frank did. I did not talk to Heitler or Perlman.

JOHN ELMER TURNER.

Direct examination.

By Mr. Glass:

My name is John E. Turner and I live at 8605 South Union Avenue, Chicago, Illinois. I am chief clerk to the superintendent

of the Rock Island Railroad, in the Chicago office. About 6:30 P. M., daylight saving time, William Gorman came to my house and said he could identify Max Berkson. He said that Max Berkson had had his trucks under pay all afternoon and would like to get the car delivered and asked me if I could arrange it. I said I thought I could and went out with him to my machine. Someone got out of another machine and said that he was a government man who had come to tell me it was O. K. to deliver the car. Gorman and I got in my car and went to Gresham Station. I called up Mr. Koeller and asked him to come to deliver the car. I called up the yards and told Mr. Wissing to stay with the car, as I was going to deliver it that night. I took Gorman to 80th and Halsted,
240 so he could tell the men the car would be delivered. Gorman got out of the car and I went back to Gresham Station. I went home to tell them where I was, and when I returned Gorman and Berkson were at the station. O'Hara and Wissing were there. We then left the station and Koeller and Berkson walked toward the car. Gorman left in my car and I let him out at 79th and Halsted. I did not see the permits.

Cross-examination.

By Mr. Houlihan:

Gorman went with me to Gresham station in my car to see if the car could be delivered. He was to meet Berskson at 80th and Halsted, Berkson having gone to get the permits.

Cross-examination.

By Mr. Darrow:

The defendant Gindich is not the Max Berkson who was at Gresham Station. Whereupon Government's Exhibits No. 18 and 19 were offered and received in evidence.

WALTER G. WALKER.

Direct examination.

By Mr. Glass:

My name is Walter G. Walker. I live in Chicago and I am a special agent of the Department of Justice, Bureau of Investigation. On November 3rd, 1920, I talked to the defendant Gindich in the Federal Building. He said the number of his permit was "Illinois B-221". At my request he wrote the names, Morris H. Gindich, Max Bergson and Max Berkson. Government's Exhibits Nos. 22 and 23 are the papers upon which the defendant Gindich wrote the names aforesaid. Whereupon Government's Exhibits Nos. 22 and 23 were offered and received in evidence.

Cross-examination.

By Mr. Darrow:

Gindich told me that he had been in Boston, New York, Newark and Washington.

241 JAMES I. ENNIS.

Direct examination.

By Mr. Glass:

My name is James I. Ennis and I reside in Chicago. I am an attorney at law and an examiner of disputed handwritings and have been since the first of February, 1906. In my opinion, the person who wrote "Max Berkson" on Government's Exhibits Nos. 22 and 23, also wrote the name on Government's Exhibits Nos. 6, 7, 16 and 19. Government's Exhibits Nos. 24, 25, 26 and 27 are photographs of the handwritings of Max Berkson and Morris H. Gindich aforesaid. Whereupon Government's Exhibits Nos. 24, 25, 26 and 27 were offered and received in evidence.

MAURICE JOHN JOY.

Direct examination.

By Mr. Kelly:

My name is Maurice John Joy. I live at 3100 Flournoy Street. I am married and have one daughter. On September 29th, John Miller, my partner in this deal, and I met one Moore, who took us to "Heitler, Perlman and Greenberg's place at the corner of Fifth Avenue and Washington Street." He said we could buy some whiskey there. We went there and Heitler said he would sell us some whiskey, but not under a hundred cases. We told him we had money enough to buy eighty-two cases and he said "Go and see if you can get some more money to buy some more." We came back the next day and paid Heitler, Perlman and Greenberg $10,824. On Wednesday, Heitler said Moore was getting $2.00 commission on the eighty-two cases, but he would let us have more for $130.00 a case. I said, "What kind of stuff is it?" He said, "Louisville." I said, "Do you know the name?" He said, "Well, that I ain't going to tell you." I said, "Well, you know it's a pretty hard matter to go out and ask anybody to buy whiskey unless we know the name of it." He said, "That I will not tell you. It is Louisville stuff." He said he expected a carload every week. He said that he had just borrowed $35,000 from Nick Hunt and $15,000 from Senator Broderick and that he had sent away $60,000 that day. I said

242 "All right, I will go and see what I can do towards getting some money together and making a little money for myself by selling whiskey." I came in the next evening, Thursday,

September 30th, between seven and eight o'clock, with Miller and walked up to Heitler, Perlman and Greenberg. We gave him the money ($10,824 for 82 cases at $132) and he said "There are still fifty-eight cases left."

Q. When you were buying that whiskey for what purpose were you buying it?
A. Some for myself and some for some friends of mine.
Q. Selling it for beverage purposes?
A. Yes, sir.

The next day we met Nick Ambrosi, who gave Miller and me, I think it was $2,780, which we turned over to Heitler, Perlman and Greenberg in Ambrosi's presence. I gave a receipt for it to Ambrosi. This was about one o'clock Friday. Besides Heitler, Perlman and Greenberg, the defendants O'Leary and Simmons were there. I heard O'Leary say to Heitler, "It is too bad that I did not know it, I could have bought the whole carload off of you." Ambrosi gave his money to Miller and Miller handed it to Perlman. We gave Ambrosi's money to Heitler, Perlman and Greenberg and they still had thirty-eight cases left which we could have. Miller went out and got a check for, I think, $4,900, which he gave to Heitler. Perlman told Miller and me to go to 61st and Wentworth, which we did. I waited there for two hours and a half or three hours and then went to 63rd and State where I met Miller, Heitler, Perlman, Greenberg, George Hans, Carrigan and a few other policemen. There were eight or ten trucks at 61st and State. I did not know any of the owners or the drivers, except my own. We waited at 61st and State until 8:30 P. M., when Perlman said to go to 83rd and Vincennes which I did. We were the fourth or fifth truck in line at the car. Heitler, Perlman and Greenberg and another man were at the car. When we got to the car, Heitler asked how many cases we were going to get and where the truck was. While we were talking, eight or nine policemen came up with drawn re-
243 volvers. Someone told Heitler to "take care of them" and Heitler put his arm around the Sergeant and went off. When he returned he said he had paid them a "grand", ($1,000) The Sergeant was the defendant Judge. Then "Heitler said, 'Go ahead and load' and we loaded up." I also saw Franks at the car, but did not know him then. After leaving the car, we were held up by the defendant Smale and other policemen at about 54th Street. They found a pint of whiskey on me. Smale took my diamond ring and diamond stickpin, but did not take the whiskey.

Q. Did you ever get that diamond pin back?
A. Yes, sir.
Q. When?
A. I got it back—now let us see, on Friday before the trial, before the police court trial.
Q. How was it delivered to you?
A. A young fellow came to my house and he rang the door-bell and he asked for me and I answered the bell there and he said:

"Here is a package—is this Mr. Joy" I said: "Yes" he said "Here is a package for you," and he gave it to me.

Q. Have you found your—and you found your——

A. Diamond pin and ring.

We then went back to the car and Heitler "was unloading the last load on a machine." We told him we had been robbed and while we were arguing, Franks came in there and jumped out of the machine and he came running down there and started to put up a war dance that he was held up by some policemen. So, Heitler said, "There is only one thing to do. I am busy with this load. I have got to deliver this load, I have got to see it delivered, and you meet me at my saloon, I will be there as quick as I can get through." Miller and I then went to several saloons. We then went to Perlman's place, at Fifth Avenue and *and* Washington, and
244 waited about an hour until Heitler, Perlman, Greenberg, Sergeant Hans and Sergeant Carrigan came in. They said to wait until the next day when they would find out who had taken it from us, if it was policemen, they would give us our money back. Heitler, Perlman, Greenberg, Hans, the driver and I then got in a machine and went to look for the whiskey. We went to Callaghan's place at 64th and South Park Avenue. I introduced myself and said that I was the one that was getting some whiskey for him and I had been held up. He said he would cancel the check by which he had paid for the whiskey, but Heitler said he could not as he (Heitler) had had the check certified. After leaving, we went down Michigan Avenue and left Greenberg at his house. Going west on 22nd Street, Hans said, "There was my truck." It was "the truck that I had hired to haul my whiskey." Between 1:00 and 2:00 P. M., on Saturday, Miller and I went to Perlman's place. Heitler, Perlman, Greenberg, Fitzpatrick, Quinn, Truedel and McCann were there. I asked Heitler what he was going to do about the money and he said he was not going to give any money back. He had a check for $4,900, which he threw in "our face," saying that it was the check I had paid, that there was not enough money in the bank to pay it and that payment had been stopped. I asked him how he knew and he replied that he had been to the bank. Miller took the check and I asked again about getting our money back, saying that a lot of the money belonged to other people. I said that if he did not do business I would see Chief Garrity. He answered that he had it on Chief Garrity and all the other coppers. We then went out and went to the Elks' Club and talked it over with a party of friends, with Truedel and McCann. I said, "Jesus, I hate like the devil to holler, but I am up against it, I owe this money and I have got to pay it. This fellow would not make any restitution whatsoever." After we had been talking a while, Heitler sent for me and I went over there and he said to me, "Keep you- shirt on, don't get hasty. Wait until Monday and I think I will be able to pay you at least fifty per cent of that money back, and the other fifty per cent, I have
got another carload coming in in a week and I will give that
245 in goods." I said "That sounds good." In the meantime, Quinn and Truedel came in with McCann, who was drunk

and crazy, and they started butting into our argument and disturbing us. They were hollering for some money that they had coming from Mike the Pike for commissions on this Grand Dad whiskey which they had sold. Finally I said to McCann that I would give him, out of my own pocket, the five or six hundred dollars that he had coming to him if he would let me alone and give me a chance to talk to Heitler and get my $20,000 back. Finally I went back to the Elks' Club and we were talking there when a nam named Caruso, whom I do not know, came for me. I went back to Perlman's and saw Heitler, Perlman and Greenberg and talked to them. They asked me if I had said anything to anybody and I said I had not. McCann came over and butted in and I said to him, "If you don't get out of here I will just give you a punch in the nose." He did not go and I shoved him away. Then Heitler said to me, "There is no use chewing the rag here. Wait until Monday. I have got a boy that is somewhere down state in some institution down there, and I have got to go home and get a little sleep. I have got to go down there tomorrow and meet him. I will see you Monday." I said "all right," and he left and I went back to the Elks' Club. Caruso came and said that Perlman wanted to see me. I went over there and Perlman gave me his telephone number and Mike the Pike's telephone number, and said that if anything happened during the night, I should call them up and let them know. I agreed, and he said, "Now everything will be O. K., you will get fifty per cent of the money back Monday and the other fifty in goods. I have got another carload coming in Wednesday or Thursday." I said, "Fine and dandy," and went back to the Elks' Club where McCann, Truedel and Quinn were. We were all drinking, and I said to McCann, "You are a fine big chump, you are, for butting in and raising Old Ned when I have got a chance to get my money back." He got chesty and I gave him a smash in the face, and Truedel came over and got a little chesty and I kicked him. I went over after Quinn, but he ran. From there I went home. About three o'clock in the morning, Miller called me up and said that Captain
246 Ryan wanted him to go to the station right away. He came to my house and asked me to go with him. I at first refused, but then consented. We went to the Englewood Police Station and talked to Captain Ryan. Heitler, Fitzpatrick and Franks were also there. Heitler and I had quite an argument. He told me he was going to pay for my burial permit and I told him it was not in him. We chewed to and fro and he called me names and I called him names and I said, "You dirty, lousy Jew——"

The Court: Never mind that. Eliminate all of the foul language.

Captain Ryan and eight or ten police officers, Miller, Fitzpatrick and Franks were present. I was present when Franks' statement was brought in and given to Captain Ryan. Heitler said something in Yiddish, whatever it was, and put his hand this way (indicating). Captain Ryan read the statement to Franks and asked him to sign it. Franks said "No, I don't want to sign it." Captain Ryan then asked if he had not made the statement, and Franks replied, "I

don't remember, I am sick, I want to lay down." Then Captain Ryan sent him down stairs and said to lock him up. I never got any of my money back, nor did I give any money back to the saloonkeepers.

Q. Can you tell the date that this diamond ring and diamond pin were handed back to you?

A. It was Friday—I think the trial was on Wednesday, the police court trial was Friday before the Wednesday that this was in the police court, because I had left town that night when they had given me my ring back, I had left that night and went to West Baden.

Before I left, Heitler told me over the telephone that he would pay seventy-five per cent of the money to the saloonkeepers, but he would not pay Miller or me anything and that we would have to "take the gate out of town and not appear before the police court." I agreed and when the trial came up in the police court we were not
247 there. Heitler did not ask me for a list of the saloonkeepers who were my customers.

Cross-examination.

By Mr. Borelli:

I have not worked since I retired from the saloon business on the 15th day of January, 1920. I never sold any liquor after prohibition went into effect, except in this deal, on October 1st, 1920. I have known Edward Smale about eight or nine years and saw him frequently. I recognized Smale as one of the men who had held me up, but I did not say anything to him. I did not tell Captain Ryan I recognized Smale, because Smale had promised me over the telephone, about eight or nine o'clock Saturday evening, that he would get my money and diamonds back if I kept him out of it. Smale and I have been very good friends for a number of years. I know Merle very well. I remember that Captain Ryan asked me if I knew any of the policemen and I said "No." I frequently go to Adolph George's saloon, but I did not say, about a month ago, that I was going to "shake down" Smale for $3,000. I have known Nick Ambrosi about five or six years, but before the first day of October, 1920, at two-thirty in the afternoon, I had not talked to him about buying any whiskey. Miller and I met Ambrosi in the Elks' Club and then went with him to Perlman's saloon, where he gave me $2,780. Ambrosi talked to Heitler, Perlman and Greenberg about the whiskey. During my telephone conversation with Smale, I do not remember that he told me to meet him and that he would take me over to Englewood.

Cross-examination.

By Mr. Kirkland:

At the Englewood Station, I saw one of the Franks, the same one I had seen at the car. I have never been in, nor heard of, his coffee shop.

248 He and the Captain were in the same room with me. They knew who I was when Mike the Pike and I started to argue and fight. Franks was present for a few minutes during the argument and fight. I helped load my truck. I had my diamond ring on my right hand and a diamond stickpin in my tie. I got into the car and several times went quite close to the man with the lantern, who was checking the stuff as it went out. I left Heitler, Perlman and Greenberg on Saturday with the understanding that they would give me back the money, fifty per cent in cash and the balance in liquor and I was perfectly satisfied with that arrangement and went to bed feeling satisfied that I would be taken care of according to this arrangement. I had Heitler's telephone number. I next received a telephone call from my partner in this deal, Miller. He told that Captain Ryan wanted him to go to Englewood Station, which is about ten or twelve miles from Flournoy Street, where I live.

Q. Well at first you didn't want to see the Captain did you?
A. No.
Q. You didn't want to see him because you were pleased with the arrangement that you claim to have made?
A. Yes.
Q. But anyway, Miller said you were in it as much as he was and you had better go?
A. Yes.
Q. And you went?
A. Yes.
Q. And when you got there you immediately made a statement to Captain Ryan, didn't you?
A. After I heard the statement of Frank I did, yes.
Q. But before you had seen Heitler, Perlman or Greenberg, you made the statement, didn't you?
A. Heitler was there. I told the Captain to call Heitler in.
249 Q. No, wait. We will be here for three weeks, if you make a speech in answering each question.

Mr. Glass: Well I——

Mr. Kirkland:

Q. Was it before you had seen Heitler, Perlman or Greenberg that you made the statement to Captain Ryan?
A. I made it in Heitler's presence.
Q. But Heitler hadn't told you that he was going back on any arrangement, had he?
A. No.
Q. Now, Mr. Joy, when you were held up you got pretty angry at Mr. Heitler, Perlman and Greenberg, didn't you?
A. No.
Q. You thought that Heitler was in on the holdup, didn't you?
A. He was.
Q. You thought that he was, didn't you?
A. I think I know it.

Q. Well you didn't see him at the holdup, did you?
A. No, but he framed it.
Q. He framed it, did he?
A. Yes.
Q. You know all these things, do you?
A. Well I think I do.
Q. You think you do?
A. Yes.
Q. And you made this statement to the police because you thought that Heitler was in on the holdup, didn't you?
A. Yes.
Q. You know now that Heitler was not in on that holdup, don't you?
250 A. Well, there is still a doubt in one way and in another way I still think that he was because he still goes around with those fellows, Hans and Smale.
Q. And you are plenty reasonably certain that Heitler had nothing to do with that holdup, aren't you?
A. I think he was in on it.
Q. Have you ever talked with anyone that said he was in on it?
A. No.
Q. Well you say when you went back to the car after the holdup you found him there?
A. Yes.
Q. Did you testify before the Grand Jury?
A. Yes.
Q. Once or twice?
A. Once.
Q. Just once?
A. Yes.
Q. Did you tell the Grand Jury the name of Miller?

Mr. Kelly: I object.

A. He was my partner.

Mr. Kelly: Wait a minute. I object to what he told the Grand Jury.
The Court: Sustained.
Mr. Kirkland: Exception.

To which ruling of the court the defendants and each of them by their respective counsel, then and there duly excepted.

Mr. Kirkland: I submit, if the Court please, that the indictment charges a conspiracy with some named defendants and some unknown—some conspirators to the Grand Jury unknown.
251 Now I don't care to bring out the details of what he told the Grand Jury, but I submit we have a right, for the purpose of showing a variance between the allegations and the proof, to show that the Grand Jury knew the names of the conspirators, if there was a conspiracy, and that their names were not unknown to the Grand Jury.

The Court: Sustained.
Mr. Kirkland: Exception.

To which ruling of the court the defendants and each of them, by their respective counsel, then and there duly excepted.

Mr. Kirkland: Could I call your Honor's attention later on a decision on that proposition by Justice Taft? And without my following up that line of examination, it may be understood that there will be an objection sustained to all of this?
The Court: Yes.
Mr. Kirkland: And exception.

To which ruling of the court the defendants and each of them, by their respective counsel, then and there duly excepted.
The Court: My ruling is upon the question or similar questions as to what he told the Grand Jury as to other conspirators.
Mr. Kirkland: Yes, about their names?
The Court: About their names.
Mr. Kirkland: Well, I would want to follow that up also by asking him if he told the Grand Jurors substantially the same story as he has told here.
Mr. Glass: That is what we are objecting to, if your Honor please.
252 The Court: To that question objection is made and it is sustained.
Mr. Kirkland: Exception.

To which ruling of the court the defendants and each of them by their respective counsel then and there duly excepted.

Mr. Kirkland: The question would apply not only to Miller but to the man he named as Fitzpatrick also.
The Court: That there may be no doubt about it——
Mr. Kirkland: I beg your pardon?
The Court: In order that there may be no doubt about it, the ruling is that this man has related the names of individuals, other than the defendants, who might have been included in the conspiracy, but whether they should have been or not would be a matter for the Grand Jury to determine and not a matter for the Court to pass upon, the sufficiency of their indictment when it has been returned.
Mr. Kirkland: I have not made myself plain. I am not asking these questions for the purpose of asking your Honor to pass upon the sufficiency of the indictment or upon the question of whether or not the Grand Jurors should have indicted these men, Miller, Fitzpatrick, Morris Frank, Harry Frank or Greengaard; but for the sole purpose of showing that there was given to the Grand Jurors at the time they returned the indictment upon which this case is being tried the names of Miller, Fitzpatrick, the two Franks, Greengaard, and perhaps some others, so that at the close of the
253 Government's case I may call your Honor's attention to what I contend is a variance between the allegations and the proof,

namely, that when the indictment says that the conspirators were to the Grand Jurors unknown, that the proof shows to the contrary.

The Court: I understand the point and the objection is sustained.

Mr. Kirkland: All right.

To which ruling of the court the defendants and each of them, by their respective counsel, then and there duly excepted.

Q. Well now, getting back to the examination by Mr. Kelly this morning, he neglected to ask you what you did for a living. You say you have a wife and family. What have you been doing for a living since the Country went dry?

A. Well, thank God, I had a means of support when I was in business, I worked all my life and earned it and I have a little bit of money put away.

Q. So you have been living on your income since then, have you?

A. Not on my income, no; but I have a little money put away.

I have not been in the liquor business since the Prohibition Act went into effect, but this is not the first deal I have been in since the Country went dry.

Q. Adolph George's saloon, where is that, you mentioned that?

A. I don't know where it is at.

Q. You don't know where Adolph George's saloon is?

A. It is on Randolph Street.

Q. You do know, don't you?

A. Yes.

254 I have been in Adolph George's saloon three or four times a week for the last six months. To enter Adolph George's saloon, you have to go down a couple of steps, but Perlman's saloon is right on the level of the street.

Q. You haven't sold any liquor or bought any except these 140 cases since July, 1919?

A. Yes, I bought it off of Perlman and Mike the Pike.

I do not remember the name of the man who hauled for me on the night of October 1st, but his name, I believe, was Greengaard or Greenfield or some name like that, of the Mid-City Express Company. I knew he was with the Mid-City Express Company and when I wanted him, I called him up. I had never used him before October 1st, nor had he ever hauled liquor for me before. I do not remember his hauling seventy cartons of liquor for me from a place on La Salle Street.

Q. Did you have anything to do with the carload of whiskey that Miller got in January?

Mr. Glass: I object to that—— .

Mr. Kirkland:

Q. Or February 20th?

Mr. Glass: I object to that as not cross examination, if the Court please.

The Court: Sustained.

To which ruling of the Court the defendants and each of them, by their respective counsel, then and there duly excepted.

It is not true that Miller and I had been making a living for at least six months prior to October 1st, by the selling of liquor. I never stated to anybody that I had a carload coming from Kentucky, or that I had a government permit.

Q. Had you been drinking on this Saturday, October 1st?

A. No.

Q. Did you drink anything?

255 A. Yes.

Q. What time in the day did you start drinking?

A. When I got in the car I opened up a case of the Grand Dad, and I opened a case and I took out a bottle and I took two or three drinks of it.

Q. Now, you were pretty much put out at Heitler when you got down to Perlman's saloon, weren't you?

A. Yes.

Q. Pretty sore at him, weren't you?

A. Yes.

Q. You wanted your money that you had lost on this liquor, didn't you?

A. Yes.

Q. You would have taken it if he would have given it to you, wouldn't you?

A. And I will take it now.

Q. And if you had taken it you would not have said anything—if you had gotten it you would not have said anything about Heitler to the police, would you?

Mr. Glass: Just a moment. I object to that if the Court please.

The Court: He may answer.

Mr. Kirkland:

Q. What is your answer.

A. No.

Q. So you are here testifying because you didn't get the money, aren't you?

A. I am here testifying because I didn't get my money back.

Q. Money could have bought you, couldn't it?

A. No, my own money back is all I wanted, no buying at all.

Q. No buying?

A. No.

256 Q. Well you didn't care who gave you the money back, did you?

A. No. If Smale and Hans and Mike had given it back to me, it would have been fine.

Q. Well, if anybody had given it back it would have satisfied you, wouldn't it?

A. Not exactly, no.

Q. Well you wouldn't have refused it would you?

A. No.

Saturday night, October 2nd, I got home about seven thirty or eight o'clock. I did not see Mr. Lingle or any reporter from a newspaper at my house that night.

Q. Why your story was in the Sunday morning paper, wasn't it?

A. George Quinn gave that story.

Q. You didn't give the story?

A. No.

I don't remember whether or not the story was in the Sunday morning paper, nor do I even recall seeing the Sunday morning paper, but I have heard that it contained the story. After this Sunday when the story was published, I learned that the Government was starting an investigation. I was still pretty sore at Heitler, Perlman and Greenberg. I did not meet Mr. Clyne, Mr. Kelly and Mr. Lingle at the Union League Club before I told the Government anything about the case. I was not told by the District Attorney that I would not be prosecuted for my part in this alleged conspiracy. I did not meet the Government attorneys until my lawyer told me "It looks bad, if I were you I would go down and come clean." Mr. Lingle was not present at any meeting which I had with Mr. Clyne and Mr. Kelly. I have never been told by anyone in the District Attorney's office that I would not be prosecuted.

Q. How much of the last three weeks have you spent in the government attorney's office?

A. I was there twice to my knowledge.

Q. Only twice?

257 A. Yes.

Q. Haven't you been there nearly every day?

A. You lie.

The Court: Witness just answer questions.

A. No.

Mr. Kirkland:

Q. You are the only honest man in the courtroom aren't you?

Mr. Glass: I object.

A. No, Mike the Pike is here.

I am thirty-six years old. The defendant McCann is about twenty years older than I am. When Heitler drew one finger (not three or four fingers) across his throat I was present, together with Miller, Captain Ryan, a lieutenant whose name I do not know, Fitzpatrick, three or four policemen and the man who wrote out the statements. I did not hear Frank say that he was afraid, but merely that he was sick, wanted to lie down and wanted a glass of water. I was present when Miller started to make his statement.

Q. Now at that time you used a lot of vile and indecent language in referring to Heitler, didn't you?

Mr. Glass: Well, I shall object to that if the Court please.
The Court: He may answer.

Mr. Kirkland:

Q. Didn't you?
A. I used the same to him that he used to me.

Mr. Kirkland: I move to strike out the answer as not responsive.
The Court: I thought you meant this was a statement that he made to Captain Ryan?
Mr. Kirkland: At that time.
Mr. Glass: No.
The Court: Do you mean that statement?
Mr. Kirkland: Not in——
258 Mr. Glass: My objection to the question was——
Mr. Kirkland: Wait a minute please, the Court don't understand the question. I mean at the time when he went to the police station, for the purpose of showing his feeling and state of mind at that time, I asked him if he didn't at that time use a lot of vile and indecent language in referring to Heitler.
The Court: The objection is sustained to that.

To which ruling of the court the defendants, and each of them, by their respective counsel, then and there duly excepted.

The Court: When he was testifying concerning it this morning I stopped him because of the vile language.
Mr. Kirkland: I am not going to ask him, that is the reason I am putting the question that way. I am not asking him what he said.
The Court: There was enough said this morning to show that he used vile language, if that is what you want. You can ask him specifically that one question.
Mr. Kirkland: That is what I want.

The Court: Was there vile language used by you to Heitler?
A. Yes.

I did not telephone Heitler before I went to the police station and tell him that I had told a newspaper man, that I was going to the police station, or that this was his last chance to come across with the money. When I went into Perlman's saloon on the night of

Friday, October 1st, I did not tell Heitler that he had held me up or arranged the holdup and that if he did not pay me the money I had lost I was going to accuse him of being in on this deal, but the only thing that was said between Heitler and me, at that time, was
259 that I told him I thought he was in on the double cross, the conspiracy to rob us after getting our money, and that I wanted my money. I did not tell him that if he did not come across with the money I would get him in on it. This was on Friday night between twelve and one o'clock. Miller was with me. When I went back to the car, I did not tell Heitler that Smale was one of the holdup men, because Heitler refused to talk to me, except to say that he was busy loading up the truck and for me to meet him later. I was present when Miller made his statement in the police station.

Q. And is it not a fact, my friend, that when Miller was making his statement that you would correct him?
A. Yes.

I know one Bob Worms, a saloonkeeper.

Q. Did you sell him some of this?
A. Him and I bought off of Mike the Pike and Perlman.
Q. Yes, all the liquor you have ever bought you bought off of Mike the Pike and Perlman, didn't you?
A. Yes.
Q. Now you haven't told every person you sold liquor to, have you, in this alleged deal?
A. Yes.
Q. Have you?
A. Yes.
Q. Let us see if you have. Do you know a man named Eddie Frank?
A. Yes.
Q. Isn't it a fact that you got some money from him to sell him liquor?

Mr. Glass: I object.

Mr. Kirkland:

Q. Around October 1st.

Mr. Glass: Just a moment. I object to this line of questioning.
260 The Court: Sustained.

To which ruling of the court the defendants, and each of them, by their respective counsel, then and there duly excepted.

Mr. Kirkland: I submit, if your Honor please, that I ought to be permitted to show that this man is protecting certain people.
The Court: Suppose it were shown that he was protecting someone, that there was somebody else whom the Government may, in its wisdom see fit to prosecute, we are not trying them now. We are

not a Grand Jury to investigate. We are just trying twenty-five, or twenty-four defendants, and I think that is plenty for one trial.

Mr. Kirkland: I agree with you.

The Court: It is hard for me to keep track of twenty-four, thus far at least.

Mr. Kirkland: Well it is hard for me to keep track of seven or eight, if your Honor please; but I submit to your Honor this, that here is a witness that has sworn to tell, not only part of the truth, but all of the truth, and if I can show that he is withholding the names of men that he may have collected money from, and show that this deal was an entirely different proposition from what he had told, doesn't that affect his credibility?

The Court: If this witness were on trial himself for any offense you might go into a lot of those matters; but as a witness you have a right to go only into those matters that affect his credibility,
261 namely, buying and selling liquor in violation of the law. "Have you been selling liquor in violation of the law?" He said "Yes." "Are you prejudiced against this man?" "Yes." "Would you have done so and so, if he had done so and so?" "No." All of those matters are proper, but whether or not he is guilty of any other offence or whether he is withholding any other names is quite immaterial to the issue we are trying.

Mr. Kirkland: Well, I asked the question because I thought it did have a bearing upon his credibility, if your Honor please.

The Court: Not when he admits that he has been selling liquor, and that in this case selling liquor or getting liquor for other people. It is nearly general credibility.

Mr. Kirkland: I understand then, that to this line of examination there is objection on the part of the Government and the objection will be sustained.

The Court: Yes sir.

To which ruling of the court the defendants, and each of them, by their respective counsel, then and there duly excepted.

At about two thirty, I called up the man who did the hauling for me, asked him if he would haul one hundred and forty cases of whiskey for me, and when he replied that he would, I told him to have his truck at 61st and Wentworth Avenue as soon as he could and that we would meet him there. I told him I was buying one hundred and forty cases of whiskey. I did not tell him I had a permit. I met him the other day for the first time since Oc-
262 tober 1st. All that I said to him was that he should tell the truth. I never tried to influence his testimony in any respect. I was in Perlman's saloon between seven and eight o'clock, on the evening of Thursday, September 30th. Miller was with me. Miller and I arrived at Perlman's place about seven o'clock. Heitler, Perlman and Greenberg were present. It is quite a busy place and there was a crowd there. We went in to a settee, about seven or eight feet from the bar. Heitler, Perlman, Greenberg and Miller were sitting down and I was standing up. The place was well lighted. Miller, and not I, did the talking. Miller carried the money, which

was two checks, $1,680.00 each, and the rest in currency. Greenberg counted it about five times and then turned it over to Perlman.

Q. You say the money was turned over to whom?

A. Heitler, Greenberg and Perlman.

Q. Well they didn't all three grab the money, did they?

A. No.

Q. Well, who took it?

A. Perlman.

Perlman took it after Greenberg had tried to count it. Heitler said to put the money behind the bar. This was about seven thirty. I left immediately, but Miller remained. I had met Greenberg a couple of times before, but had never had any business dealings with him. I have been a bartender and saloonkeeper for seventeen years. I used to work for Miller at 4 South Clark Street. The first time I heard about this carload was on Wednesday, September 29th. Moore went with us to Perlman's. It was about one or two o'clock in the afternoon. Greenberg and Heitler were present. We were there about a half hour. Miller was with me. I returned to Perlman's saloon on Thursday, September 30th, about nine thirty. Greenberg was present; I don't remember whether or not he was there when I came back, but he was there when Miller paid the money; I don't know whether he was there or not. I do not remember if Mr. Heitler was there. I merely stopped long
263 enough to get Miller and then left. Two or three bartenders were behind the bar, but I do not recall that Perlman was there. I have ridden home on the elevated with Ambrosi every night for two or three years. I turned Ambrosi's money over to Miller and Miller gave Ambrosi a receipt for it. He did not ask for a receipt, but we gave it to him of our own free will.

Q. He got a receipt from Miller for the money he turned over, didn't he?

A. He turned the money over to Miller and Miller gave him a receipt for it. He did not ask for it, we gave it to him of our own free will. Miller paid it back to him too.

Q. Did you get your receipt back when you paid the money back?

A. No.

Q. You did not get the receipt back?

A. Mike the Pike got it.

Q. He was not there, was he?

A. No, sir.

Q. Did you see him get the receipt?

A. No.

Q. Did anybody tell you that he got it?

A. Heitler got it.

Q. Did anybody tell you that he got it?

A. Yes.

Q. Who?

A. Ambrosi and Miller told me.

Q. Ambrosi told you?

A. Miller told me and Ambrosi told him he gave Heitler the receipt.

Q. Miller told you that Ambrosi told him?

A. Heitler paid 75 per cent of the money and Miller paid the other 25 per cent out of his own pocket.

264 Q. There isn't any question pending. You are pretty anxious to tell all you can, aren't you?

A. Very much.

Q. Anyhing that you can think of that you think would hurt Heitler and Perlman, or either one of them, you are anxious to tell, aren't you?

A. Not exactly. I would like to tell the truth.

I met Moore that day for the first time. This was the first big liquor deal that I was in, although I purchased liquor once or twice from Perlman. I do not count a couple of cases.

Q. Mr. Kelly asked you this morning your purpose in buying this 140 cases. What was it? I did not get your answer.

Mr. Glass: Mr. Keely, if I recollect right, did not put the question what his purpose was.

Mr. Kirkland:

Q. What did you buy it for?

Mr. Glass: Mr Kelly put this question: "Did you buy it for beverage purposes," and he answered yes.

Mr. Kirkland:

Q. Is that what you bought it for?

A. Yes.

Q. To sell to other people?

A. To sell some and to keep some for myself.

Q. How much did you intend to keep?

A. A few cases.

I met Perlman on Friday, October 1st, at one thirty. Greenberg was present. We dropped Mr. Greenberg off at his house about 2:30 A. M., Saturday, October 2nd, after we had gone back to the car. Heitler, Perlman and Greenberg were present at one thirty, Friday, when I arrived. Miller was with me. About two o'clock, Ambrosi's money was handed to Miller and Miller gave it to Perlman. I do not remember that Greenberg said anything, except that everything was O. K. and that we would get the

265 goods. I left the saloon about a quarter after two and started for the South side, where I met the truck at 61st and Wentworth Avenue. I stayed there with the truck until about five or six o'clock. I did not see Heitler, Perlman or Greenberg at 61st and Wentworth. I then went with the truck to 63rd and State, arriving about six o'clock. I saw Heitler, Perlman and Greenberg at 63rd and State. I stayed there until eight thirty. Perlman told me to

go to 83rd and Vincennes. I got to 83rd and Vincennes about a quarter of nine or nine o'clock. I left the car with my load about nine thirty. I saw the man at the car who had the lantern. Some policemen with drawn revolvers came up. Heitler spoke to the Sergeant and walked away with him. Perlman gave me his telephone number on Saturday and gave me Heitler's telephone number, and told me that if anything happened during the night to call them up, but when my partner told me that Captain Ryan wanted to see him, I did not call them up.

Further cross-examination.

By Mr. Borelli:

After the holdup, I went back to the car and talked to Greenberg and Heitler.

Mr. Kirkland: Will your Honor please instruct the witness to return tomorrow, not for the purpose of any further cross examination; but because of some witnesses I expect to have here whom I could not get here today.

Mr. Glass: We will consent to have Mr. Joy here whenever you want to use him.

Mr. Kirkland: I would like to have him here tomorrow.

The Court: You will have him tomorrow morning, Mr. Glass.

Mr. Joy: Your Honor, I will be here anyhow. I will be here every day.

266 ALBERT GREENWALD.

Direct examination.

By Mr. Glass:

My name is Albert Greenwald and I live at 755 West Congress Street. I am in partnership with Charles Fisher in the motor truck service business, having three trucks, and was in such business on October 1st, 1920. On October 1st, Mr. Joy called me up about two or three o'clock in the afternoon to hire me to haul some whiskey. He told me to get a truck and go to 62nd and Wentworth Avenue and wait for him. About three thirty, Joy drove up in a touring car with two or three men. The machine stopped long enough to let him out and then went on. He said to wait a little while and he would come back and let me know all about where I should meet him and everything. I waited an hour or two but he did not return, nor did anyone else come. I saw some trucks down the block and followed them to 63rd Street, where I waited. About six or seven or seven thirty, Joy came up to me suddenly and said to hurry down to 81st and Vincennes to get the first load. I went there, Joy following me in his touring car. A man, who I afterwards found out was Miller, was with him at that time. Joy told me to pull around the railroad track, which was west of Vincennes Road. When I got there, I started looking around and walked back to Vincennes Road,

where I saw Miller. Miller asked where Joy was and I said that he had gone up toward the railroad track. Miller said to tell him to hurry down to the car, that they had located the car. I went and looked for Joy and when I found him coming from the railroad track, I told him what Miller had told me to tell him. He then said to hurry to 84th and Vincennes and get the load there. I went there and pulled in the team track, but had to wait, as there were two or three trucks ahead of me. The only police officers I saw were standing at the corner about two hundred feet or more from the car that was being unloaded. The people about the car were talking, but I did not pay any attention to the conversation. I was the fourth truck to be loaded. I saw a man in the car with a lantern. I did not see anybody checking up. The man inside the car with the lantern told me how many cases I was to get. I do
267 not know who he was. After I got my load, Joy told me to go right down Vincennes Road to Halsted, and down Halsted to 22nd and Fisk Street. I started, but was stopped at 47th Street by men who held me up. One man got on the truck and told me to drive to 18th and Canal, which I did. They then put me in a machine and took me to 22nd and Wentworth Avenue, where they gave me a dollar and put me off. I then went to my office, near Halsted and Van Buren, and, after waiting a while, went home. The next morning I met Fisher. Joy called me up the next morning and told me where I could find my truck.

Cross-examination.

By Mr. Kirkland:

I had known Joy about six months before he came to see me. I met Joy about two or three weeks ago, for the first time since October 1st, and asked him if he was going to pay me. He said, "They will call you up for trial pretty soon".

Q. Tell us the whole conversation.

A. Well, there was only a little while there—he said he would fix me up after a while. He said—but I don't like to say what he said.

Q. Did he say anything about Heitler or Perlman or Greenberg? Did he mention their names?

A. Yes, he said I should—well—he swore, and says I should do something.

Q. You should do something, what?

A. Well, "Jass them," that is what he said.

Q. What?

A. To Jass them.

Q. Jass who?

A. Well, "the Jews," he said.

Q. Jass the Jews?

A. Yes.

Q. That is what Joy said to you?

268 A. Yes, sir.

Q. This man here (indicating the witness Joy).

A. Yes, sir.
Q. What did you understand him to mean by Jass?
A. Well, anybody who knows how to talk slang knows what that eans.

The Court: Court and counsel don't know.

Mr. Kirkland:

Q. Did you ever haul any liquor, or your Express Company ever ıul any liquor for Mossy Joy, before this Friday you have told us ›out?
A. I don't remember.
Q. I want you to think well. Didn't you haul seventy cartons of quor for him one day?
A. The Mid-City Express did, but I didn't.
Q. Yes. Do you know when that was?
A. There was only forty cases.
Q. Forty? I stand corrected. When was that, about, if you re-ember when it was; anyway it was before this Friday you have ld us about?
A. Yes.
Q. When Mr. Maurice Joy came to see you about hauling this quor, did he come personally, I mean this Friday job, or did he ephone you?
A. He called up.
Q. He called up?
A. Yes.
Q. What did he say to you when he called up?
A. He told me I should go out to 63rd Street, he had got a car-d of whiskey out there, I should get a load.
Q. That he had a carload, and you should go out and get a load?
9 A. Well, he said he had a car out there; I should go out and get as many as I could put on.
Q. He had a car, and you were to go out and get as many as you ıld get on?
A. Yes.
Q. Did he say anything about a permit?
A. After a while, when I wanted to go home, he said, "It is all ht". I saw lots of people around there and I got kind of afraid, l he said, "It is all right, I got a permit to haul the stuff".

lo not remember whether or not he got into the car. The other ›ple were talking to him. On Friday, when Joy hired me, he did mention Heitler's name, or Perlman's name, or Greenberg's ne. The following Monday morning, I was called to the Pro-ition office in the Transportation Building. Monday morning, en Joy called me up and told me where I could find my truck, said, "You know what it means for you to haul that booze; it ans three years in jail for you, and you tell the truth". That was he told me that time. He told me, I think it was the last time

I saw him, just a week or so ago, that "You know you saw Heitler and them at the car." My license number is 26577.

CHARLES FISHER.

Direct examination.

By Mr. Glass:

My name is Charles Fisher and I live at 1459 West 14th Street, Chicago, Illinois. I am a partner of Albert Greenwald. I was hired to haul whiskey on October 1st, by two men. I do not see them in the courtroom. They told me to go to 59th and Wentworth. My partner told me he was going to 59th or 61st and Wentworth to haul some whiskey for Mossy Joy. I went back to the office where these two men were waiting for me and they told me to drive to the same place. I went there and about an hour or an hour and a half later they met me. I waited there until it became dark, when they
270 told me to go to 59th and State, which I did. I saw five or six trucks at 63rd and State. After I had waited there a considerable time, they told me to go to 83rd and Vincennes, which I did. I then backed into the car and the two men who had hired me started to load the truck. At that time, there were four or five men around the car and three or four inside the car. The man with the lantern inside the car was checking the cases. After getting one hundred cases, the two men told me to tie up the load and pull out, which I did. I could not say that I saw Heitler or Greenberg at the car that night. After leaving the car, I drove to 22nd and State and Albany or Sawyer. There was another truck waiting there, and under the directions of the men, I unloaded onto that truck. I do not know who these men are, but I could identify them. I have never seen them since that day.

Cross-examination.

By Mr. Kirkland:

I do not remember seeing Mossy Joy on Friday night. I do not say that I saw Mr. Heitler at the car, nor did I see that gentleman (indicating the defendant Perlman, who was then standing).

Redirect examination.

By Mr. Glass:

They might have been there without my knowing it.

MAURICE JOHN JOY recalled.

Direct examination.

By Mr. Kelly:

I wish to correct some of my testimony of yesterday. I was asked in regard to the Union League Club. I did not know I was in the Union League Club the night I went there with Mr. Lingle, but I thought I was in Mr. Kelly's room in the hotel. I found out this morning that I had been in the Union League Club and came to you (Mr. Kelly) to put me back on the stand. I went there twice to see you.

Cross-examination.

By Mr. Kirkland:

Mr. Kelly called me up last night and told me that the place was the Union League Club and told me to come down here this
271 morning. Miller was at my house last night, but I did not talk about my testimony very much. I just left him this morning in the United States Attorney's Office. Mr. Lingle took me to the Union League Club, but he did not tell me where he was going to take me. It was Mr. Kelly who told me that I was mistaken about the Union League Club and he told me last night to come here this morning.

JOHN MILLER.

Direct examination.

By Mr. Glass:

My name is John Miller. I live at 5007 Washington Boulevard. I have been a resident of Chicago for twenty years or more and was formerly a saloonkeeper. On September 29th, 1920, while Joy and I were together, we met a man named Moore. I do not know his first name. I had know him a very short time. Moore told us that we could purchase liquor at Perlman's saloon. This was in the afternoon between two and three o'clock. Joy and I went to Perlman's saloon, saw Heitler, Perlman, and Greenberg, and told them we had come to buy liquor. I am not certain as to whether or not we mentioned Moore's name at the time. Greenberg told me they expected some liquor in and that we could have some. I do not think that we went into details about how they were going to get it. The conversation was to the effect that it would cost us $132.00 a case for a hundred cases. This was between two and three o'clock Wednesday afternoon. After remaining there about twenty minutes, Joy and I left. Joy and I returned about seven o'clock or a little later, Thursday evening, September 30th. We had the money for eighty-two cases at $132.00 a case. Greenberg and I sat

down in the settee and I gave the money to him. We called Perlman over and he checked the amount and found our count was right. Perlman then took the money behind the bar with him. Heitler came in before we left, but he did not say anything. Joy, Heitler, Perlman, Greenberg and I were drinking at the bar. After that, Joy and I went home. We had been told by Mr. Heitler to return the next day at noon and he would tell us where and when we could get our liquor. I think he pulled some papers out of his pocket and said one of the papers was a Bill of Lading. We were
272 told by Heitler that he had fifty-eight cases left and that we could have it for $130.00 per case. Greenberg told me that we would haul this liquor in the afternoon and if there was any interference from Federal or City authorities, our money would be cheerfully refunded. We came back the following Friday, shortly after noon, and paid Perlman for twenty cases more at $130.00 a case. Joy, Heitler, Perlman, Greenberg and Ambrosi, who was to get the twenty cases, were present. I had not, at that time, received the money from Ambrosi. After paying the money for these additional cases, we gave Ambrosi a receipt stating that if he did not get his liquor his money would be refunded to him. Mr. Heitler then said there was still thirty-eight left and we told him we would accept them if he would take a check, which he said he would do. I went to a friend and borrowed the money to purchase the thirty-eight cases. I did not go back, but met Mr. Heitler at 63rd and State Street, where I gave him the check for the thirty-eight cases. On Friday, shortly after noon, in Perlman's saloon, we had been told by Mr. Heitler, in the presence of Mr. Perlman and Mr. Greenberg, to take our truck to 61st and Wentworth. Joy and I got in a machine and met the truck at 61st and Wentworth. Joy stayed with the truck at 61st and Wentworth and I went to 63rd and State, where I met Heitler and Greenberg and asked them how long before we would get our load. Heitler told me that Perlman was then at the track with the first truck and when that was loaded, we could get ours. This conversation took place a few minutes after I had given him the check. I waited around 63rd and State Street until after six o'clock. Greenberg remained there during that time, but Heitler left. I heard Heitler and Greenberg talking together about some difficulty in getting the car to a place where it could be unloaded. About seven o'clock, we were told by Perlman to take our truck to 82nd and Vincennes, where the car was. We drove South of 82nd and Vincennes and Joy took the truck over to the team track to have it loaded. I stayed in the machine, about half a block from the car, waiting for the truck to be loaded. There were other automobiles where I was waiting, but I only noticed one. That one was Heitler's. In about an hour, Joy came out and said
273 the truck was loaded. We followed the truck north on Halsted Street to about 53rd Street, where about four automobiles overtook us. Two machines stopped us and the other two went after the truck. After searching us and taking the keys from the car, they left us. I had an extra key in my pocket and Joy and I then went back to the freight car at 82nd and Vincennes.

When we returned to the car, I saw Heitler, Perlman, Greeberg and some other people whom I do not know. We told Heitler the story of the holdup about as I have related it here and he told us that he did not guarantee against "stickup men"—that his protection only went as far as police and government officials. While we were there, Franks came up with a story similiar to ours. I did not hear all of Franks' story, but I heard him say that his load was stuck up on State Street "by men who flashed stars and claimed to be government officials." We were told by Heitler to go down town and wait for him in Perlman's saloon as he was busy.

Q. What was he doing?
A. He was loading up the last truck.
Q. Did you stay until the truck was loaded?
A. Yes, sir.

We got to Perlman's saloons about one o'clock Saturday morning. After we had been there quite a while, Heitler, Perlman, Greenberg and a couple other men *men* came in. Heitler told Joy that he thought the best thing to do was to go out on the South Side on a scouting expedition. Joy, Greenberg, Perlman, Heitler and some other people and myself were present. I left and went home. The next day, on the way down town, I stopped at Joy's for him and he told me the result of the scouting expedition and suggested going to Perlman's saloon to see Heitler and find out our chances of getting back our money. We saw Heitler and Perlman, but I am not positive about seeing Greenberg. We got there about noon or shortly after. We were there about an hour or *or* better and then left. We went across the street to the Elks' Club and saw Frank McCann and George Quinn, but nobody else at that time. The
274 conversation was general, about what had occurred the night before and I cannot remember the exact words. "Everybody was trying to be a Sherlock Holmes and discover who stuck up the truck and took our booze away from us. It was along that line, what happened the night before." A man by the name of Caruso came for Joy. I had seen him before.

Q. Where at?
A. I saw him around Heitler's saloon, I didn't know who he was at the time.
Q. Where is Heitler's saloon?
A. Or Perlman's saloon, rather.

He said someone wanted to see Joy at Perlman's saloon. Joy went over to the saloon and I stayed in the Elks' Club. I did not notice anyone go with him. He came back and the same people were present as before. Caruso came for Joy again and Joy left a second time. Joy told me that from his conversation with Perlman in Perlman's saloon, the chances of getting our money back looked pretty good, but after he came back the second time he was mad and said other parties were interfering in the conversation at Perlman's. He mentioned Frank McCann, but no one else. Later on he men-

tioned a man by the name of Truedel and one by the name of Quinn. I let Joy handle the deal entirely and finally he came back and told me that they had agreed to let the whole matter lay over until the following Monday and that he was of the opinion that we were going to get our money. Ambrosi was in Perlman's saloon Saturday morning. He told Heitler, Perlman, Greenberg, Joy and myself, that if he didn't get his money he would kill us all.

Q. Now did you give Abrosi his money back?
A. Every dime.

Sunday morning, shortly after three o'clock, Joy and I went to the Englewood Station. I saw Heitler and Perlman, two reporters from The Tribune and Captain Ryan there. Captain Ryan asked me about what happened the night before and I answered his questions. I do not know Franks. I was there more than an hour and went home after I left.

275 Cross-examination.

By Mr. Kirkland:

I saw a man at the car who I was afterwards told was Franks. I did not see Franks at the Police Station. I heard Heitler deny to Captain Ryan that he knew anything about this matter. I did not hear Perlman talk with Captain Ryan. When we went back to the car after the holdup, I went right up to the car door. I saw Heitler.

Q. Where was he?
A. Just about finished loading.
Q. Where was he?
A. Where was he?
Q. Yes?
A. Out in the street standing alongside of the truck.
Q. Was the truck up against the car?
A. No, sir.
Q. Was the truck loaded?
A. As far as I know.

I am sure that Greenberg was there, a couple of hundred feet from the car. Joy and I told Heitler about the holdup substantially as I have told it today. At that time a man came up, who I afterwards found out was Franks, together with another man whose name I don't know exactly, but it was Greenwald or Greenberg, something with a "Green" to it. I will not say positively that Joy did not tell me his name, but I don't recollect. I could not see the car from where I stood. Heitler said he was busy with the last load.

Q. Loading it up?
A. It was already loaded when we got there.

Joy and I drove down town. We stopped at two saloons on the way down. When Joy and I left, I do not remember whether or not

Greenberg was with Perlman and Heitler. Greenberg did not go with us, nor did we stop at any place on Michigan Avenue and let Greenberg out at his home. I have known Joy between six and eight years. He used to work for me as a bartender. I live at
276 5007 Washington Blvd., which is about three miles from where Joy lives. I did not see very much of Joy after he quit working for me as a bartender. Since the Country went dry, I have never been in any other liquor deals with Joy, nor have I been in any liquor deals at all, except this one. Up to September 30th, 1920, I used to see Joy about once a week, meeting him casually. On September 29th, I was walking along Randolph Street when I met Joy. I knew he could be found within a radius of a block from Clark to La Salle Street. I was not certain that I could find him in Adolph George's, but I have met him there occasionally. I think we met Moore on the street. I had known him for about a week, but I had not talked with him before the 29th of September. Joy and I were together on the 30th, on the 1st, on the 2nd and we left the Police Station together on Sunday. About two weeks or so after the holdup, Joy and I went to the Union League Club to meet Mr. Kelly. A Tribune reporter, named Lingle, told me Mr. Kelly wanted to see me. Joy was present at the time. Lingle told me in Joy's presence that he wanted to take me down to see the Government attorney. I said all right.

Q. What did Mr. Joy say?
A. The same thing.

The second time, we met Mr. Lingle by appointment somewheres down town. During the second talk with Lingle, Joy was right with me. Mr. Lingle told us to come over to the Union League Club, which we did. We were there about an hour. There was no talk about whether or not I would be prosecuted if I told my story. I told my story without knowing whether or not I would — prosecuted. In the Union League Club, I made a statement to the Government Attorneys.

Q. And is it not true, Mr. Miller, that as you were making your statement Mr. Joy would correct you and say "That is not true, it was this way?"
A. I don't remember that happening, no.
Q. You would not deny it, would you?
277 A. (No answer by the witness.)
Q. You would not deny but what that took place, would you?
A. No.
Q. And do you remember the Sunday morning you were at the Englewood Police Station, Mr. Joy was present when you answered Captain Ryan's questions, wasn't he?
A. He was.
Q. And isn't it a fact that he would swear at you and tell you that you were not telling it correctly, that it was the other way, and wouldn't you then state it the way Joy told you to, isn't that a fact, Mr. Miller?

A. He didn't make me alter my statement at the police cour
The only thing he did out there was to become involved in an argu
ment with Heitler.

Q. Didn't he, on several occasions while you were being talke
to by Captain Ryan, and when you were stating to Captain Rya
what you claimed to be the facts, didn't Joy correct you in severa
instances, isn't that true?

A. He was talking quite a lot.

Q. And he was suggesting changes in your statement, wasn't he

A. (No answer by the witness.)

Q. Wasn't he, Mr. Miller.

A. I don't know whether he was suggesting them or not.

Q. Well he would suggest things that ought to be changed
wouldn't he?

A. He seemed to think that I did not elaborate enough on some o
my answers.

Q. Yes, and he would tell you what the elaboration ought to b
isn't that true?

278 A. He wouldn't tell me that.

Q. Well he would tell it in your hearing, is that correct

A. In my hearing, I could hear him all right.

Q. Yes, you had no trouble hearing him, did you?

A. No.

When Captain Ryan called me by telephone, he did not tell me t
bring anyone, but I telephoned Joy that the Captain had sent fo
me and insisted on Joy's going with me. I left it entirely to Jo
to get my money back. The Saturday after the holdup, I wen
about a mile out of my way and stopped for Joy, who suggested tha
we go to Perlman's. I did not go on the scouting expedition Frida
night, but went home. On Friday night, or early Saturday morn
ing, Joy and I went to Perlman's saloon. We were not perfectl
sober as we had finished up the greater part of a pint which we had
but I would not say that we were under the influence of liquo
When we arrived in Perlman's saloon, we did not find Perlma
behind the bar. On Friday night at one o'clock in Perlman'
saloon, I did not say to Perlman, nor did Joy say in my presence
"We had a carload and two of our trucks have been stuck up"; no
did I or Joy say that Heitler knew something about it; nor did Per
man point to Heitler sitting at a table playing cards with two me
in the saloon; nor did Joy or I say to Heitler that we had bee
stuck up and thought he knew about it and that if he didn't com
across with the money, we were going to jam him. I did not sta
in Perlman's saloon, Friday night or early Saturday morning, mor
than one half or three quarters of an hour. I am not sure if Green
berg was there. After I left Perlman's saloon on Saturday an
went to the Elks' Club, I did not return to the saloon. After Jo
came back the second or third time, he told me he thought th
chances of getting the money were good, as Perlman took the att
tude that we were entitled to our money back. He told me that h
had the telephone numbers of Heitler and Perlman. He did no
tell me at that time that they had agreed to pay a certain percent i

money and a certain per cent in liquor. On Saturday, I drove him home in my machine and left him there between eight and
279 nine o'clock. At the Englewood Station, I believe Joy made his statement first, but in my presence. I did not hear him tell the Captain that he had made an arrangement to get back 50% in cash, and 50% in liquor, nor did I tell the Captain that, nor had Joy ever told me that.

Q. Is it not a fact—would you mind looking this way—is it not a fact that in January or February, 1920, you received a carload of liquor here in Chicago?

Mr. Glass: I object, if your Honor please, to that question.
The Court: He may answer.

Mr. Kirkland:

Q. Is that not true?
A. I did not.

Out of this carload of 1,250 cases I did not keep 250 for myself. I used to work for Righeimer and knew McCann and Truedel when they worked there. I did not, in January or February, 1920, tell quite a number of people in Righeimer's saloon about the purchase of a carload of liquor. I was willing to let Joy make any deal he could in order to get the money back. I was willing that Joy should agree to keep still and I was willing to keep still myself if I could get my money back. I had to answer Captain Ryan's questions, because he had the whole story in the newspaper right in front of him when Joy and I were there. I asked Joy how the newspaper got the story. I talked to Lingle, the reporter, at the station that morning. He did not tell me that he had been to Joy's house the night before, Saturday night, but a man named Dougherty told me how he got the story. On Friday, I gave Heitler a check in the sum of $4,940 for the other thirty-two cases. After he told me he would take a check, I went out on the West Side and saw a friend, one Merle, who gave me the check. I think Joy went with me, but I am not positive. After we met Moore on the 29th of September, I do not think we took him to Perlman's with us. We got to Perlman's between two and three o'clock in the afternoon. I saw Greenberg there. Joy and I stayed inside the saloon about an hour. We told either Heitler or Perlman that Moore had sent us over
280 there. Greenberg told me they expected the liquor in and told me we could have some. I did not go into details in this conversation. We were supposed to take not less than 100 cases at $132.00 a case. Joy and I stayed right together all the time and if Joy had any conversation with Heitler, it was in my presence. We spoke to Heitler while we were in there. If I talked to Heitler it was in the presence of Joy and if Joy talked to him it was in my presence. I did not hear anyone mention the name of Senator Broderick, or of a man named Hunt. We returned about seven o'clock Thursday night, September 30th, and stayed there about an hour or more. Greenberg was there when we arrived. Greenberg

and I sat on the settee and I handed him $10,824. I did not get a receipt for it. I am not sure if Heitler was standing there, but I think he came in afterwards. Perlman was called to the settee after Greenberg couldn't count the money. When Heitler came in, I asked him when we were going to get our goods and he said to come the following noon and he would tell us. He pulled a piece of paper from his pocket and said that is was a Bill of Lading. I did not see the paper or handle it. After the holdup, we made no attempt to follow the truck. I arrived at 63rd and State Street shortly after three o'clock and remained until about seven. I talked to Greenberg there at different times during the afternoon. I believe he stayed there all the time, the same as I did. The defendant Mandel Greenberg is the man whom I mean by Greenberg. I believe he stayed at 63rd and State Street on Friday, the 1st day of October, 1920, from three o'clock until seven o'clock, P. M. If he left at all, it was only for a few minutes at a time. I did not see Perlman there. I did not see Heitler, Perlman or Greenberg at 61st and Wentworth Avenue. I saw Heitler at 63rd and State Street. At 82nd and Vincennes, I did not go up to the car while the truck was being loaded. I saw Heitler's machine there, but I do not know what make it was. Perlman did not drive up in an automobile at 63rd and State Street and tell me to go to 81st and Vincennes, nor did I see him in a machine that night. I drive an automo-
281 bile and have owned different cars. I know a Hudson when I see one. I could not say if Heitler's car was a Hudson. I know that a Hudson has a sort of a white triangle on the hubs and I know the hood of a Hudson and can distinguish it from other cars. While in the Elks' Club, McCann and Truedel were not with me all of the time, but went in and out. I have no business at present and have been without one for three months. Before that, I was an automobile salesman for Columbia machines for two or three months. I also have been in the second-hand automobile business and am in that business, more or less, at present. I am quite familiar with all kinds of automobiles and with the different makes.

Cross-examination.

By Mr. Borelli:

I have know- the defendant Nicholas Ambrosi for a long time. I never spoke to Ambrosi about buying any liquor for him until the afternoon of October 1st, 1920, at two thirty. Ambrosi did not give me any money, but gave it to Perlman in the presence of Joy and myself. I gave Ambrosi a receipt for it, having so much confidence that the deal was on the square that I had no hesitancy in obligating myself to make good any loss he sustained. I did not give him any money back. The whiskey that Nick Ambrosi was to get, he was to get from Joy and myself and we were to deliver it to him.

Further cross-examination.

By Mr. Kirkland:

Saturday, after picking up Joy, I went to Perlman's saloon. Heitler was in Perlman's saloon. Joy was talking to him, but I cannot say that I heard Joy tell him that he had to make good right then.

ARTHUR F. GILES.

Direct examination.

By Mr. Glass:

My name is Arthur F. Giles. I live at 5641 Maryland Avenue, Chicago, Illinois. In October, 1920, I was paying teller at the Citizens Trust & Savings Bank at 55th and State Street-, Chicago. Government's Exhibits Nos. 28 and 29 are in my handwritng. Government's Exhibits Nos. 28 and 29 are debit slips showing the
282 amount taken out of the account upon certification of a check.

Whereupon, Government's Exhibits Nos. 28 and 29 were offered and received in evidence, said Exhibits being in words and figures, as follows, to wit:

283 GOVERNMENT'S EXHIBIT No. 28.

Debit.

Date, 10-1-20.

Account E. P. Graham.

Description.	Amount.
Fred Merle	$1,680.00
Total	.....

CITIZENS TRUST & SAVINGS BANK,
By —— ——.

Approved by
A. F. G.

[Across face:] Certified. Paid 10-1-20.

284 GOVERNMENT'S EXHIBIT No. 29.

Debit.

Date, 10-1-20.

Account Thos. McLaughlin.

Description.	Amount.
Fred Merle	$1,680.0
Total	.....

CITIZENS TRUST & SAVINGS BANK,
By —— ——.

Approved by
A. F. G.

[Across face:] Certified. Paid 10-1-20.

285 Cross-examination.

By Mr. Igoe:

I think these slips were made out the 1st of October. Fred Mer is the payee of the check. I do not remember who presented th checks for certification—it may have been the maker, the payee anyone else. I do not recognize among the defendants anyo whom I have ever seen before.

HARRY H. HUNTER.

Direct examination.

By Mr. Glass:

My name is Harry E. Hunter, and I live at 224 West 64th Stree Chicago, Illinois. I am cashier of the Citizens Trust and Savin Bank. The defendant Thomas McLaughlin is a depositor in th bank, and so is the defendant E. P. Graham. Government's E hibit No. 30 is the record of certifying a check account on the ge eral books. From the ledger, it appears that on October 1st, 192 a check for $1,680 was certified, of which Thomas McLaughlin w the maker, and one of the same amount, of which E. P. Graham w the maker. These checks were paid on October 7th.

Whereupon Government's Exhibit No. 30 was offered and receive in evidence, and was and is in words and figures, as follows, to wi

286 GOVERNMENT'S EXHIBIT No. 30.

Sheet No. —. Name of Account, Certified Checks. Account No. —.

Date.	Description.	Charges.	Credits.
1920.			
Oct. 1.	Thos. McLaughlin	.....	1,680.00
	E. P. Graham	.....	1,680.00

GOVERNMENT'S EXHIBIT No. 31 (Reverse Side of Exhibit No. 30).

Account No. —.

Name of Account, Certified Checks. Sheet No. —.

Date.	Description.	Charges.	Credits.
1920.			
Oct. 7.	Thos. McLaughlin	1,680.00	.....
	E. P. Graham	1,680.00	.....

287 Government's Exhibit No. 31 is the reverse side of Government's Exhibit No. 30.

Whereupon Government's Exhibit No. 31 was offered and received in evidence, the said exhibit appearing on the reverse side of Government's Exhibit No. 30, heretofore offered and received in evidence, and being in words and figures as on said reverse side appears.

ELMER JUDD.

Direct examination.

By Mr. Glass:

My name is Elmer Judd. I live at 1144 East 45th Street, Chicago. I deal in new and used automobiles. I purchased some cars of the West Side Motor Express in August 1920, from the Lobdell Investment Company, who had foreclosed a mortgage on them. On August 16, 1920, I sold one of the trucks, serial No. 72784-N, Motor No. 286, to P. J. O'Leary. Government's Exhibit No. 32 is a duplicate of the bill of sale issued to P. J. O'Leary on the sale of said truck to him. Whereupon Government's Exhibit No. 32 was offered and received in evidence. The balance due on the truck was paid by check, which I had instructed was to be made payable to Lobdell & Company. P. J. O'Leary is a different person from the defendant James O'Leary.

WILLIAM BRACE.

Direct examination.

By Mr. Glass:

My name is William Brace. I live in Evanston, Illinois. I am an attorney, representing E. L. Lobdell & Company. I had charge of the foreclosure of the mortgages on the West Side Motor Express trucks. Government's Exhibit No. 33 is the mortgage I foreclosed on the West Side Motor Express trucks about June 1st, 1920. Whereupon Government's Exhibit No. 33 was offered and received in evidence. Elmer Judd purchased three trucks at that sale. I remember that one check which paid the debt of Elmer Judd had the name of James O'Leary signed to it.

288 Cross-examination.

By Mr. Dunne:

I do not know what James O'Leary signed the check.

EDWARD W. COLLINS.

Direct examination.

By Mr. Glass:

My name is Edward W. Collins. I live at 2565 Ainslie Street, Chicago, Illinois. I am bookkeeper for the Lobdell Investment Corporation and have charge of their books. In payment of one truck, a check was received signed by James O'Leary. This check was deposited in the Northern Trust Company.

Cross-examination.

By Mr. Dunne:

I do not know to whom Judd sold any of the three trucks. I do not know the signature of the defendant James O'Leary or whether or not he signed the check.

JOHN E. FITZPATRICK.

Direct examination.

By Mr. Kelly:

My name is John E. Fitzpatrick and I live at 907 Garfield Boulevard. I have never had any business dealings with Nathaniel Perlman except in this matter, which, I think, was the last part of October or the first part of September. I made arrangements with a man who said his name was Joe Riley to buy one hundred cases of

whiskey at $130.00 a case. He said his name was Joe Riley, but I always doubted it. This man told me it was necessary to pay some money that night and I gave him a check. He couldn't get it cashed at the bank, so the next day I got some money out of the bank and he gave me back the check. He then took me to Wells and Washington Street and said that these were the men I had to deal with. I then went back and got the rest of the money. Then I came back and was told by somebody to go down into the basement and I laid the money on the table in the basement of Mr. Perlman's saloon. I think Mr. Perlman was there, together with four more that I didn't know. I laid $13,000 on the table, but I couldn't say who picked it up. I don't believe I asked for a receipt. I think it was Joe who told me to go into the basement.

After I had paid the money, I was told to go to 59th and
289 State Street. I don't remember who told me, but I think it was Joe. Joe told me I would get the liquor between three and five o'clock in the afternoon. Moore was present when I talked to Joe. I went to 59th and State Street where he had told me to wait until he came. I waited until after six o'clock and then went back home. About eight o'clock, someone, I can't say who, called me by telephone and told me to get a truck. I telephoned for my boy's truck and left orders for him to come to 63rd and State. When I got there, the boy was there. Someone told me to follow an automobile south. I followed and was led up to the car. I loaded one hundred cases on the truck. I did not talk to anyone when I was at the car, but I heard someone say 'Give Fitzpatrick a hundred cases.' I- was dark, after ten o'clock, very near eleven, and I did not recognize anyone. The whiskey I got was Kentucky Bourbon and I think it was Grand Dad. We then left the car and got to about 79th and Vincennes when two policemen stopped us. I then came down town with the whiskey and I then had ninety-six cases. I gave some of the whiskey to those to whom it belonged. I was taken to Captain Ryan's office, about two o'clock Sunday morning, in the Englewood Police Station. I saw Captain Ryan and a lot of policemen, but that is all I know of. I paid $135.00 per case for one hundred cases. They said they would guarantee delivery, but I cannot recall that anything was said about police or federal protection, though there might have been. When I met Joe and another gentlemen at the bank, I gave them $500 and took back the check. At the Englewood Police Station, the Captain pointed out a man he said was Heitler. I could not say for sure that he was one of the men around the table in the basement of Perlman's saloon.

Cross-examination.

By Mr. Kirkland:

I did not know Heitler before I saw him in the police station. I do not remember ever having seen the defendant Mandel Greenberg. I am in the saloon business at 100 North Franklin, which is near Washington. I had known Joe Riley for a couple of months.

I had bought some liquor from him before, but he couldn'
290 deliver and gave me my money back. When Joe was try
ing to sell me this liquor he did not mention Heitler's name
nor Perlman's name, nor Greenberg's name. I never gave Heitle
a check, nor Perlman, nor Greenberg. On the first day of the deal
which I think was Friday, Joe took me to Wells and Washington
He did not tell me where we were going and I thought it was t
the Elks' Club. It was about a quarter of eleven when I went t
Wells and Washington. I thought we were going to the Elks' Clu
because Joe said the deal had been made there the night before, an
I had gone to look for him there that Friday morning. Nothin
had been said about the deal having been made in Perlman's. Whe
I went into Perlman's saloon, I stepped up to the bar with Joe an
bought a cigar. Then I went down into the basement. Joe intro
duced me to a man named Perlman on the sidewalk outside th
saloon. When I went to the Elks' Club, I did not find Joe or th
man who came out of the bank with him. It was about a quarte
of twelve when I went in to pay the money and the place was prett
well crowded. (The defendant Perlman arose and stood in fron
of the jury and within two feet of the witness.) I cannot say i
this man (indicating the defendant Perlman) was present when
laid the money on the table, as I do not know him.

Redirect examination.

By Mr. Kelly:

I would not say this was not the man who was introduced to me
but I am not sure. He looks much stouter than that man.

Recross-examination.

By Mr. Kirkland:

I know Mr. Joy. Joe Riley was not Mr. Joy. Miller has bee
pointed out to me, but he is not Joe Riley.

HUGO E. GUSTAFSON.

Direct examination.

By Mr. Glass:

My name is Hugo E. Gustafson. I live at 1420 Fulton Stree
Chicago, Illinois. I was in the truck business about October 1s
1920. On that day, I received a telephone call to go to 62nd an
Wentworth Avenue. This was about eleven in the mornin
291 I was to be there at two o'clock in the afternoon. I do n
know who was talking over the telephone. I went to 62n
and Wentworth and waited about an hour. A closed touring c
came up alongside of my truck and whoever was in the car to
me to wait there for a while. About an hour and half later t

touring car came back and I was told to go to 62nd and State and wait there, which I did. This was about three thirty or four o'clock. I saw some other trucks there. After dark, the touring car came up and I was told to follow it. I followed it to 83rd, backed into the car and put one hundred and ten boxes on the truck. After I loaded, I covered the truck. I could not make out anyone standing around the door of the car. There was one small lantern inside the car on the floor. After I got the load and pulled out, someone from the touring car told me to follow them. I followed them. I followed the touring car into an alley on 35th Street and stopped. I have been to that place with Mr. Walker since and found out that it was a saloon. I was told to put off thirty-five cases, which I did. I then backed out into the street and followed the touring car again up State Street to the other side of Fullerton Avenue. I have been there since with Mr. Walker and Mr. Callahan, and I believe it was St. James Place. The touring car stepped at St. James Place and I unloaded. I didn't see anyone's face that entire evening. I do not know who lives at the address where the seventy-five cases were left.

EDWARD FITZPATRICK.

Direct examination.

By Mr. Glass:

My name is Edward Fitzpatrick and I live at 5621 South May Street, Chicago, Illinois. I am the son of John Fitzpatrick. I had a truck on October 1st, 1920, and remember going to the Gresham freight yards. The number of my car is 61075. At the team track I got in line and moved up towards a box car. I got one hundred cases for the load. There was only one lantern at the car.
292 After leaving the car, I drove North and unloaded at my father's place about ten thirty or eleven o'clock at night.

EDWARD W. COLLINS, Recalled.

Direct examination:

By Mr. Glass:

Government's Exhibit No. 35 is in my handwriting and is a deposit slip showing that Lobdell & Co., on August 17, 1920, made deposits in the Northern Trust Co. of Chicago items, $325.50 and $1,575 and other city items of $8.00.

Whereupon Government's Exhibit No. 35 was offered and received in evidence.

WILLIAM N. WADDELL.

Direct examination.

By Mr. Glass:

My name is William N. Waddell. I live in Wilmette, Illinoi I am chief clerk for the Northern Trust Company. Government Exhibit No. 35 is a deposit slip of the Northern Trust Compan The check for $1,575, shown on Exhibit 35, was drawn on th Drovers National Bank.

ALBERT EYNON.

Direct examination.

By Mr. Glass:

My name is Albert Eynon. I live at 2307 Giddings Stree Chicago, Illinois. I am chief clerk at the Drovers National Ban The defendant James O'Leary is a depositor in the Drovers Nation Bank. On October 18th, a check in the sum of $1,575 was charge to the account of James O'Leary.

Cross-examination.

By Mr. Dunne:

I do not know what the check was.

WILLIAM HAZEKAMP.

Direct examination.

By Mr. Glass:

My name is William Hazekamp. I live at 753 West Marquet Road, Chicago. I am a police officer assigned to the Vehicle Bure of the Police Department in Chicago.

293 Mr. Dunne: I will admit in evidence a telegram from th Secretary of State stating that a license which was issued the West Side Motor Markets, 1801 West Madison Street, beari No. 50529, was issued for a machine called Patrio, L-286, 72784-N.

JOSEPH V. CALLAHAN, Recalled.

Direct examination.

By Mr. Glass:

I know a truck driver by the name of Gustafson. On Decemb 3rd, Mr. Walker, of the Department of Justice, Mr. Gustafson a I went to a place on 35th Street. We entered the bar room a

made known our identity. In a coal shed, which was used by the proprietor of the saloon, we found fifty or seventy-five empty whiskey bottles. The labels contained the distillery number, which I think was 420-C-64. We then went to 448 St. James Place. The defendant John McGovern occupies one of the apartments in that building. Gustafson pointed out the building at 448 St. James Place as the place where he delivered seventy-five cases of whiskey. On November 25th, I had been to 448 St. James Place to execute a search warrant, which is Government's Exhibit No. 37, and found Mr. McGovern in the second apartment. I searched the premises and in a bedroom found a satchel containing thirteen one pint bottles of liquor. On the rear porch we found some pieces of boxes, which I have here. The marking on the pieces reads, as follows: "Old Grand-Dad Distillery Company, Distillers. T. N. Lindsey, Fifth District, Kentucky—No. 270,475, bonded in the spring of 1916, bottled in the fall of 1920, proof 100. 3 gallons inspected. Inspected September 3, 1920."

Whereupon the said three pieces of box were offered and received in evidence as Government's Exhibit No. 38.

I also have two other pieces. The marking on these is as follows: "Serial Number 207,356".

Whereupon, the said two pieces were offered and received in evidence as Government's Exhibit No. 39.

I also have five pieces of the top of a case, which reads as
294 follows: "Glass, this side up with care, two dozen pints, Max Berkson, Peoria, Illinois, Permit Number Illinois 221, Shippers Old Grand-Dad D. Co., Hobbs, Kentucky."

Whereupon, the said five pieces were offered and received in evidence as Government's Exhibit No. 40. Whereupon, Government's Exhibit No. 41 was offered and received in evidence, the same being a pint bottle of Grand Dad whiskey. Whereupon, Government's Exhibits Nos. 1, 2, 3, 4, and 5 were offered and introduced in evidence. Whereupon, it was stipulated by and between the attorneys for the respective parties hereto, that there was in the files of the Prohibition Office no permit issued to Max Berkson. Whereupon, Government's Exhibit No. 9 was offered and received in evidence, said Exhibit being the permit to purchase issued to Morris H. Gindich. Whereupon, Government's Exhibits Nos. 13, 18, 19, 20 and 21 were offered and received in evidence. Whereupon, the Government rested its case in chief. Whereupon the Court ordered the defendants Galvin, Kane, Marner, Wagman, Knebelkamp, Wathen, Smale, Judge and Simmons dismissed from the case. Whereupon, the defendants Heitler, Perlman, Greenberg and McCann each filed in writing his motion to direct a verdict and the defendant Quinn made the same motion orally, which said written motions were in words and figures as follows, to wit:

Now comes Michael Heitler, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson

& Fleming, his attorneys, at the close of the evidence for the Unite States of America, and moves the Court to give the following in struction:

"The Court instructs the jury to find the defendant Micha Heitler not guilty."

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON &
FLEMING,
Attorneys for the said Defendant.

Now comes Nathaniel Perlman, defendant in the above entitle cause, by Thomas J. Symmes and McCormick, Kirkland, Patterso & Fleming, his attorneys, at the close of the evidence for th
295 United States of America, and moves the Court to give th following instruction:

"The Court instructs the jury to find the defendant Nathani Perlman not guilty."

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON &
FLEMING,
Attorneys for the said Defendant.

Now comes Mandel Greenberg, defendant in the above entitle cause, by Thomas J. Symmes and McCormick, Kirkland, Patterso & Fleming, his attorneys, at the close of the evidence for the Unite States of America, and moves the Court to give the following in struction:

"The Court instructs the jury to find the defendant Mandel Green berg not guilty."

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON &
FLEMING,
Attorneys for the said Defendant.

Now comes Frank McCann, defendant in the above entitled caus by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of the evidence for the Unite States of America, and moves the Court to give the following in struction:

"The Court instructs the jury to find the defendant Fran McCann not guilty."

THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON &
FLEMING, *Attorneys for the said Defendant.*

which said motions were, and each of them was, overruled and denie by the Court.

To which said rulings of the Court, the said defendants, and eac of them, by their respective counsel, then and there duly excepted.

296 Whereupon, the defendants, to maintain the issued on their behalf, offered the following evidence, to wit:

WILLIAM A. GORMAN, One of the Defendants Herein.

Direct examination.

By Mr. Houlihan:

My name is William A. Gorman. I am thirty-one years old. I was born in Chicago, Illinois, and have lived there all my life, except three years when I was in New Mexico and two years when I served with the 13th Engineers. I enlisted in that regiment and was promoted to corporal, then to sergeant and then commissioned as a lieutenant. I live at 7744 Lowe Avenue. I worked for the Rock Island Railroad about ten years. After I returned from France, I went back to work for the Rock Island Railroad. I know John Turner and have known him about five years. I know Max Berkson and have known him about six or eight years. I first got acquainted with him at White City or at the Woodlawn Cafe. I last saw him on October 1st, 1920, when he came to my home about six o'clock in the evening. I do not know, nor did I ever know, where he lives, but it is some place around 63rd and South Park. I met him in a social way, not in business. On October 1st, he came to my house about six o'clock and told me he had a carload of whiskey at Gresham Station. He said he had been trying to get it since three o'clock but could not because of lack of identification. He asked me if I would identify him to Turner. I asked him to wait until the next morning and he said he had three trucks waiting and was afraid it would be stolen if he left it at the station all night. I went downstairs with him, got in his car and went to Turner's house, about six blocks from mine. Two other men were in the car. Berkson did not introduce me to them. While going to Turner's house, I asked to see the Bill of Lading, which he said he did not have with him, but which he said he could get in twenty minutes. I told him to get off and get it (this was at 80th Street and Halsted) and then I would bring back Turner and meet him there. I explained the situation to Turner and Turner and I got into his car and went to the depot. When he came back, he said it was all right and we went to 80th and Halsted, but Berkson was not there.
297 Turner then said he had to get the agent and told me to get Berkson and come over with him. In about five minutes Berkson came and we went to the depot. When we got there, the depot agent was there, so Berkson and I signed the papers. Turner came in while I was signing the identification. I met O'Hara and Wissing, the watchmen, outside. I did not examine the Bill of Lading or the permit. I got into the machine with Turner and went to 79th and Halsted. Then I went home to dinner. I live about six blocks from Gresham Station. I walked back and got a couple of bottles about nine-thirty. Some man told me he would

like to telephone, that he was a government man, so I told the agent and asked him to lend me the key to let this man telephone, which he did. Mr. Koeller came in while I was sitting at the telephone desk. Someone brought in five or six bottles of Grand Dad and I took four of them and went home. I knew nothing more about the carload of whiskey until I read it in the paper Sunday morning. I then told my mother I was going out of town, went to the Astor House and spent my time trying to find Max Berkson in Chicago and Benton Harbor. When I returned from Benton Harbor, I called up my home and was told that a man by the name of Simmons, from the Transportation Building, was looking for me. I went right over there and saw Mr. Simmons and Mr. Joe Callahan. I have told this same story to all the government agents. I did not see a lawyer or consult anybody before I went to see Mr. Simmons. I think Government's Exhibits Nos. 6 and 7 are the instruments I signed in identifying Max Berkson. I never saw the defendant Michael Heitler until the day we were arraigned before Judge Landis. At that time, I saw Nathaniel Perlman and Mandel Greenberg for the first time. I have had no business dealings with them. I only know the defendant Morris H. Gindich from seeing him in court. He is not Max Berkson. I have known Frank O'Hara six or eight years. He is a Rock Island detective. I have known H. P. Wissing about seven years. He is also a Rock Island detective. I first saw the defendant Frank McCann in this courtroom. The first time I heard about this carload of whiskey was six o'clock,
298 October 1st, when Berkson came to the house. I identified Berkson because I had known him and I wanted to accommodate him.

Cross-examination.

By Mr. Glass:

Before August, 1917, I had met Berkson about fifty times at White City, or the Woodlawn Cafe, or some of the other parks or dance halls. Berkson was just a passing acquaintance of mine and I knew nothing about him. As soon as I came in Gresham Station I started to tell Koeller what I was there for, but he replied, "I know, I have been talking to Turner." I did not ask Berkson what he was doing or where he lived at the time I identified him. He told me that he had a Government permit and his Bill of Lading for it. Koeller left the office for a lantern and came back, and he, Berkson and I went out together. When I went up to the car to get the key to let the man telephone, I saw O'Hara and Wissing there. Koeller said that this was the last load and that he would be in the office in a few minutes and for me to take the key and take care of it. In about five or ten minutes Koeller came into the office himself. At that time I did not see any man standing around the trucks or on the street. While I was in there telephoning, I did not see any of the permits. I told Mr. Callahan that I had signed the papers and, in fact, made no secret of it. I read about this carload in the papers

every day, but my name was not mentioned. I looked for Max Berkson around 63rd and Halsted, 63rd and South Park, 63rd and Cottage Grove, and around White City, the Woodlawn Cafe, Martin's and the places where I thought he might be, but I was unable to find him. Berkson never offered me anything or gave me anything, except four pints, for identifying him. I did not know at first that Berkson had to have a certain permit for a carload of whiskey, but I knew he had to have some kind of a government paper. I do not know what was done with the papers after they were signed. The man who wanted to telephone said that he wanted to report that the car has been unloaded all right and I thought that the government had a man there for that purpose.

299 MANDEL GREENBERG, one of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

My name is Mandel Greenberg. I live at 5020 Michigan Avenue, at the Hotel Lyon. I am forty-three years old. I was born in Russia and was about ten years old when I came to this country. I did not go to school after I got here, but went to work for my father in the junk business. When I was about twelve or thirteen years old, I worked for myself in Evanston in the commission business for five or six years, selling products to hotels and boarding houses. I then started tending bar for my brother-in-law when I was about twenty-one. I have owned a half dozen saloons. The first brewery I worked for was Wacker & Birk. I worked for them about thirteen years. I am working for them now as an agent. My family consists of my wife, one boy eighteen, another boy ten and a girl fifteen. Wacker & Birk Company is located at South Park and 24th Street. When Prohibition went into effect, Wacker & Birk consolidated with the McAvoy Brewing Company in the manufacturing of de-alcoholized beer. For the past two or three years, my work has been to investigate saloons and if I think a man has a good location, I put in our fixtures and he buys our goods. I also go out of town and establish agencies for our goods. I never saw the defendant Gindich before the beginning of this trial and have had no dealings with him. I never talked with any of the defendants or with anyone else about hiving Gindich go to Peoria in September, 1920, or at any other time, to get a car of the Rock Island Railroad containing liquor reconsigned to Chicago. The first time I met the defendant Gorman was in this courtroom. I never talked with him or with anyone else about having him identify Gindich as Max Berkson. I do not, to my knowledge, know anyone by the name of Max Berkson. I never talked with any of the defendants or with anyone else about sending money to Louisville to get a carload of Grand Dad whiskey. I never saw the defendants Knebelkamp and Wathen before I saw them in this court room. I was never in Kentucky. I

never sent anyone to Kentucky in August, September,
300 October or November, 1920, or at any other time, to purchase
liquor. I never knew Harry Frank. I have known Mickey Frank by sight for ten years, but have never been in his saloon and have never sold him liquor or had any business dealings with him. I knew Louis Greengaard by sight, but I never had any dealings with him in regard to this carload of liquor or any other liquor. The first time I ever saw Mossy Joy was in court here when he was on the witness stand. I have never spoken to him in my life and never met him in Perlman's saloon. I have known John Miller for about eight years, but have only spoken to him about a dozen times. I know the defendant Nathaniel Perlman. I had an agent in the brewery by the name of Kennedy and he, Perlman and I opened the saloon, which is now Perlman's. Kennedy got out in April and I have had no interest in the saloon since May 1st, 1920. Heitler never, to my knowledge, had an interest in that saloon. I have known Perlman about twenty-five years and have known the defendant Heitler about fifteen years. Heitler and Perlman are customers of mine. I was in Perlman's many times in the month of September. The first time I saw Sergeant Judge, William Truedel, James O'Leary, McLaughlin, Graham, Nicholas Ambrosi, George Quinn and Frank McCann was in court. I have known Simmons for six or seven years, but never had any arrangement with him about buying Grand Dad liquor. I believe John McGovern and his brother were at one time customers of mine, but I never talked with them about getting Grand Dad whiskey from Kentucky or getting it here at Chicago. I did not know George F. Callaghan until I met him here in court. I never agreed or talked or arranged with any of the defendants, or anyone else, to buy liquor from the Grand Dad Distillery Company in the months of August, September, October, November, 1920, nor did I have any talk, agreement or understanding with them, or anyone else, to have a carload of whiskey moved from Kentucky to Chicago or Peoria, nor did I have any arrangement or understanding or talk with them, or anyone else, about
selling any carload or any amount of liquor in Chicago. I
301 did not collect, together with Michael Heitler or Nathaniel
Perlman, or by myself, on or about the 25th day of September, 1920, or at any other time, in Chicago, $155,000 or any amount of money from any of the defendants, nor did I arrange with them or anybody else, nor do I know about anyone arranging with Morris Gindich, to have a carload of liquor reconsigned at Peoria, nor did I arrange or talk with anyone about that or about a carload of liquor at Hobbs, Kentucky, or any other place in Kentucky. I did not make any arrangements with Gorman to identify Gindich as Berkson nor did I ask anyone else to make such arrangements, nor did I know of their doing so. I did not, on the 1st day of October, 1920, have anything to do with unloading a carload of liquor at Gresham Station, nor did I know of Heitler or Perlman or anyone else arranging to have a carload of liquor unloaded on October 1st, at Gresham Station, or at any other time or place. Whereupon, the witness was withdrawn for the time being.

ALBERT KIRSCHSTEIN.

Direct examination.

By Mr. Symmes:

My name is Albert Kirschstein. I live at 6121 Michigan Avenue. I am the manager of the bottling department of the Wacker & Birk Brewing Company and have been connected with that concern for eighteen years, except for a short period of time. I have known the defendant Mandel Greenberg about fourteen years. He is one of the agents of our company and has been connected with the company for twelve or thirteen years. Wacker & Birk Company do not manufacture any kind of beverage, but sell the beverages manufactured by the McAvoy Company. On the last of every month, the agents are present at the brewery all day, morning, afternoon and evening, for the purpose of checking the customers' books with the ledger. Mr. Greenberg, as an agent of the brewery, has certain customers and, so far as it is practical, each agent figures out his own customers' books. We are more particular about having the agents present in the months of March and September than any other months, because those months are the end of our fiscal half year and September is the end of the fiscal year, when the books are closed. Aside from the fact that our agents are at the brewery on the last of every month, I have an independent recollection of Mandel Greenberg's being there on the 30th of September, 1920. Mandel Greenberg, in September, 1920, lived on St. Lawrence Avenue. I went home with him one night from the office, on the last of the month. He was moving from his flat into a hotel and I remember distinctly that on the way home that night, I told him I thought it was a poor move and that I thought the proper way to bring up a family was with the association and surroundings of a home instead of the public living in a residential hotel. We had started from the office shortly after eight o'clock. We had had dinner, that is the evening meal, in the office of the company shortly after six o'clock. Those present were the agents, the office force and the brewmaster. We do not pay for the meal individually, but the company pays for it. That evening there was a discussion in regard to a new beverage which I told the agents we would put on the market in a short time in bottles. We had previously been selling it in draft. After dinner, we finished up our work. I do not remember seeing Mr. Greenberg around while I was finishing up my work. About an hour after dinner, Mr. Greenberg and I left the office, 2340 South Park Avenue, went to the 26th Street Elevated Station and went south. Mr. Greenberg got off at 51st Street. On the way home on the elevated, our conversation about the hotel took place. We do not have our agents attend at the brewery or serve them with meals on any night except the last day of the month.

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Cross-examination.

By Mr. Glass:

On the evening to which I have referred, agents Ryan, Beckett, Sennett and Greenberg were present, together with George Ortseifen, Mr. Heveron, Mr. Trick, cashier, the bookkeeper and myself. That day I had been to the bottling shop and across the street to the brewmaster's, where I stayed ten or fifteen minutes or perhaps half an hour. I made several trips through the bottling department, which is in a big building. I could not say whether there was anybody in the bottling department who was not there that day.
503 I first saw Mr. Greenberg in the morning at his desk, which is the first desk at the head of the stairs coming in. I do not know if he was there at noontime. The first time I saw Mr. Ortseifen was, I think, in the afternoon about four thirty, but I do not remember exactly. I do not know whether or not Mr. Greenberg left the office during the day, as he could go in and out without reporting to me. After Mr. Greenberg left me at 51st Street on the elevated, I continued south to 61st Street.

Redirect examination.

By Mr. Symmes:

The agents do not go out and solicit business on the last day of the month. At that time they are in the office. Mr. Trick was not at supper, as he never stayed for supper. My attention was first called to the occurrences of that day about a month or six weeks ago.

GEORGE ORTSEIFEN.

Direct examination.

By Mr. Symmes:

My name is George Ortseifen. I live at 4559 Grand Blvd. I am Vice-president of the Wacker & Birk Company and have been with that company in different capacities for eighteen or twenty years. I have known Mandel Greenberg about fourteen years. He has been connected with the company twelve or thirteen years. He started in as a bottled beer salesman and worked up through his energetic manner in producing trade. According to the custom of the brewery, everyone in connection with the clerical end of our office, the agents, and everybody in the selling end of our business, should be in the office as much as possible on the last day of the month. It is not so important that they be there in the morning, but we insist that they be there the rest of the day to straighten out the books and other matters which are part of our business on the last day of the month. I remember that Mandel Greenberg was in the office of the company on the last day of September. Greenberg brought me his

spending ticket for the 29th, which he would have ordinarily
304 brought to me on the 30th. The ticket shows where he was, the name of the people he saw and the amount he spent. I never O. K. a ticket without putting on it the date it was presented to me. I O. K'd. the ticket, put the date on it and it was cashed by the cashier and is now in his possession. I have looked at the ticket and it was O. K'd on the 30th. After going to lunch and attending to some other things, I returned to the office that day about four o'clock or a quarter after. About three quarters of an hour after I returned, Greenberg came to me and said that he would like to leave a little early and that he would not be with us that evening; that he was moving; that he had sold some furniture; that the people were calling for it, and that his wife was not well. I told him that this was the one night in the year that he could not get off, because it was the last of our year. That was about three quarters of an hour after I returned. I did not miss Mr. Greenberg after that. I have to call in the agents in the course of business. If I pick up a beverage book and find that a customer has been using a barrel a week, I might call in the agent any time and tell him to suggest that the customer take half barrels and keep his beverage fresher, or I might find that a man is not paying properly and tell the agent to see that the bill is paid when he goes there the next time. I have different occasions to call the agents. The meal is usually served around six or six thirty. I did not miss Greenberg at dinner that evening. I did not see Mr. Trick there that evening. I left that evening about eight or eight thirty. I do not remember who was present when I left. I went to Mr. Glass' office last Saturday and saw there a man called Mossy Joy.

Q. I will ask you if you saw Mossy Joy in Mr. Glass' office? Is Mr. Joy here? Did you see a man whom they call Mossy Joy in Mr. Glass' office?

A. There was a man sitting directly opposite me at the table, who was after introduced by Mr. Kelly, and Mr. Kelly said "Mossy Joy, that is Mickey Frank"——

305 Mr. Glass: I object to the conversation, if the Court please.

A. And then he said "I know you do not know each other now."

Mr. Glass: I object to anything that was said there.

The Court: That answer may be stricken out.

Mr. Symmes: I do not want to embarrass you.

Mr. Glass: You won't embarrass me, but that is not competent evidence.

Mr. Symmes: I don't want to show what you said.

Mr. Glass: It is not any embarrassment on my part, because I was very well satisfied, but I am going to object to what was said there as not competent evidence in this case.

The Court: I cannot see its competency.

Mr. Glass: That is the ground of my objection.

Mr. Symmes: If the court please, it is to show Mr. Mossy Joy's attitude. I am not going to ask what anybody else said, but I am

asking what Mossy Joy said at that time, as showing his feeling there.

Mr. Glass: I object to that.

Mr. Symmes: What he has to do in this case

Mr. Kirkland: Show his interest.

Mr. Symmes: Show his interest in the case.

Mr. Glass: I object to it; it is not competent.

The Court: Sustained.

Mr. Symmes: Exception.

To which ruling of the court, the defendants, by their counsel, then and there duly excepted.

Mr. Symmes: If the court please, I would like the record to show the fact that I expect to prove that Mossy Joy at that time——

306 Mr. Glass: Now, I object to that.

Mr. Symmes: —attempted to influence the testimony of this witness, and said a number of things, and I would like to show what he said.

The Court: If there is any statement made by the witness Joy at that time, which is contrary to what he made upon the stand, you may show it, as a dispute of his testimony, but if you are merely offering it for the purpose of showing that Mr. Joy was present, and took part in the conversation, or manifested an interest in the matter, the objection is sustained. If Mr. Joy contradicted something that he said upon the stand, that is a different thing.

Mr. Symmes: I do not think it was in contradiction of anything that he said here.

The Court: Objection sustained.

Mr. Symmes: Exception.

To which ruling of the court, the defendants, by their counsel, then and there duly excepted.

Cross-examination.

By Mr. Glass:

I left the brewery about twelve thirty that day and returned about four fifteen. I did not miss Mr. Greenberg when I went out. I do not recollect seeing Mr. Greenberg there immediately upon my return, but I remember I had a conversation with him about five o'clock. I do not remember if Mr. Greenberg was there when I left that evening.

Redirect examination.

By Mr. Symmes:

There is no way that Greenberg, Ryan, or any of the agents could know when I might call for them. I have never known Mr. Greenberg to miss one of the dinners on the last of the month.

307 ADOLPH HERRMANN.

Direct examination.

By Mr. Borelli:

My name is Adolph Herrman-. I live at 624 South Peoria Street, and I am a Deputy Coroner of Cook County, Illinois, and have been for the last sixteen years. I have known the defendant Nicholas Ambrosi between twenty-five and thirty years. His reputation in the neighborhood where he resides, for honesty and integrity, and being a law abiding citizen prior to the 1st day of October, 1920, was good.

Cross-examination.

By Mr. Glass:

I do not know where he lives at the present time, but his last residence was in the Roxbury at Sangamon and Van Buren. I have often visited his saloon. I once held an inquest over the body of a man that he shot, four or five years ago. I have met him practically daily for a number of years and visited his place a great number of times.

J. T. CAULFIELD.

Direct examination.

By Mr. Borelli:

My name is J. T. Caulfield. I live at 1449 West Plum Street, and have lived there between forty-nine and fifty years. I am connected with the department of election commissioners of the city of Chicago. I have known Nicholas Ambrosi for twenty or twenty-five years, and have lived in the vicinity where he lives for twenty-five years. The reputation of Nicholas Ambrosi, prior to the 1st day of October, 1920, among his friends and associates, for honesty and integrity and for being a law abiding citizen, is good.

Cross-examination.

By Mr. Glass:

I do not know where Mr. Ambrosi resides at the present time He kept a saloon at the corner of Van Buren and Halsted, and after that at the corner of Sangamon and West Van Buren in the
308 Roxbury, where he lived at that time. After Mr. Ambrosi got into this trouble, I discussed in a general way his reputation, but I cannot recall exactly with whom.

Redirect examination.

By Mr. Borelli:

I have never heard anything against his reputation.

GEORGE E. HART.

Direct examination.

By Mr. Borelli:

My name is George E. Hart. I live at 3855 Gladsie Avenue. I lived in that neighborhood eleven years. I have known Nicholas Ambrosi about ten years. I am in the contracting, painting and decorating business. The reputation of Nicholas Ambrosi in the community where he resides, among his friends and associates, prior to the 1st day of October, 1920, for honesty and integrity and being a law abiding citizen, was good.

Cross-examination.

By Mr. Glass:

My store is located at 515 South Crawford. Mr. Ambrosi is in the saloon business. I have been in his saloon about twice a year, doing work there. My opinion is based upon seeing Ambrosi's family and seeing him every day in the neighborhood.

Redirect examination.

By Mr. Borelli:

I have never heard anything said against his reputation for being a law abiding citizen.

FRANK KEOGH.

Direct examination.

By Mr. Borelli:

My name is Frank Keogh. I live at 14 North Menard and have lived there fourteen years. I am Vice-president of the Fortune Products Company. I have known Ambrosi about fifteen years. He used to be a customer of mine. His reputation in the City of Chicago, prior to the 1st day of October, 1920, for being a law abiding citizen in the community where he lived was good.

309 Cross-examination.

By Mr. Glass:

Mr. Ambrosi sold our beer in his saloon. My acquaintances with him is entirely on account of business transactions.

MICHAEL A. SERRITELLA.

Direct examination.

By Mr. Borelli:

My name is Michael A. Serritella. I live at 925 Blue Island Avenue. I am a physician and have been for the past five years. I have lived in Chicago thirty-two years. I have known Mr. Ambrosi for eleven years. The general reputation of Nicholas Ambrosi for being a law abiding citizen in the community where he lives in the City of Chicago, prior to the 1st day of October, 1920, was good.

Cross-examination.

By Mr. Glass:

I once acted as physician for him at my office. I have never been at his home. I knew him as a saloonkeeper at Van Buren and Sangamon. I based my opinion upon his reputation in the neighborhood where he is in business. I do not know what it is in the neighborhood where he lives.

CHARLES EDWARD PUGH.

Direct examination.

By Mr. Borelli:

My name is Charles Edward Pugh. I live at 3265 Washington Blvd., and have lived there for fifteen years. I am a physician and surgeon and have been in practice for thirty years in the city of Chicago. I have known Nicholas Ambrosi for thirty years. The reputation of Nicholas Ambrosi, prior to the 1st day of October, 1920, in the city of Chicago and in the neighborhood where he resides, for being a law abiding citizen, was good.

Cross-examination.

By Mr. Glass:

I first became acquainted with Mr. Ambrosi in my office. I am his family physician. My office is about four blocks from his residence, but I live about a mile from him. I have not talked
310 with anyone in the neighborhood about his reputation.

Redirect examination.

By Mr. Borelli:

During the entire time I have known him I have never heard anything said against his reputation for being a law abiding citizen.

MANDEL GREENBERG, Recalled.

Direct examination.

By Mr. Kirkland (continued):

I do not know the witness Fitzpatrick, nor have I ever had any business dealings with him. The first time I knew Sergeant Smale or the defendant George Hans was in the courtroom. I was not in Perlman's saloon on the 30th day of September around seven o'clock, nor between seven and seven thirty, nor was I in there when some money was paid. The morning of September 30th, I got down to the office about nine o'clock or nine ten. On the last day of the month we always stay in the office, except for going out for lunch, and we stay until we finish our work, which sometimes takes us until nine o'clock in the evening. Mr. Ortseifen is the Vice-president. Mr. Kirschstein is the manager and Mr. Trick is the Treasurer. On the last day of the month, the books are checked over and the agents figure them up and the boss checks them up and O. K.'s them. Very often, he calls for us and wants to know why some of our customers do not handle certain of our products or wants to know other things about the trade. I have no way of telling what time of the day he may call for me. On the 30th of September, I stayed in the office until about twelve thirty. The office is on the second floor in a room about 40 x 50. While I am sitting at my desk, I can see Mr. Ortseifen at his desk. My desk is the first desk at the head of the stairs. There are no private offices on the floor, with the exception of a partition around the Vice-president's desk. The partition, above the height of four feet from the floor, is plain window glass and, from my desk, I can see Mr. Ortseifen, the Vice-president, sitting at his desk. The cashier is in a regular cashier's cage. I had lunch at the corner of Michi-
311 gan and 22nd Street and then returned to the office, about a quarter of two. I did not leave the building again until about a quarter after eight that evening. I was not at Perlman's saloon that night at seven o'clock or seven thirty and I did not meet Mossy Joy and John Miller, Heitler and Perlman there and Joy and Miller did not pay a large sum of money to me or, in my presence, to Mr. Perlman or Mr. Heitler. I had my evening meal, on Thursday, September 30th at the brewery. It was served by a colored fellow. There is only one doorway coming up to the second floor. Everyone in the office was at supper, I think, except Mr. Trick. Mr. Ortseifen was there and Mr. Kirschstein. I think the name of the colored fellow was John. At dinner we were talking about a new beverage, which we had on draft and were about to put into bottles, and as to whether or not it would sell that way. We finished dinner about seven o'clock. The brewery is at 24th and South Park Avenue. Perlman's saloon is on Wells and Washington. The shortest period of time within which one can go from the brewery to the saloon in an automobile is thirty or thirty-five minutes. I did not keep an automobile at the brewery for my own

use. After dinner we finished up our work. About a quarter after eight I left to go home. I did not leave the office between the time I finished dinner and the time I left to go home. I left the office with Mr. Kirschstein, got on the elevated at 26th Street and went south. We were talking about my moving into the Hotel Lyons, at 51st Street and Michigan Avenue, and I told him I was going to sleep there that night. On Thursday, September 30th, about five thirty in the afternoon, I told Mr. Ortseifen I wanted to get home early; that my wife was sick; that I was breaking up housekeeping and that some of the furniture was going out. He said that I could not leave and that I had to stay there. Mr. Kirschstein and I rode together to 51st Street, where I got off and he continued south. The 51st Street Elevated Station is about three blocks from Michigan Avenue. On Thursday, September 30th, I was not in Perlman's saloon at any time, nor did I meet Mossy Joy or John Miller. I cannot say where I was on Wednesday, the day before, as I
312 was around town attending to my business. I do not remember if I was in Perlman's on Wednesday, but I might have been. I did not see Mossy Joy and John Miller at Perlman's on Wednesday or discuss with them the question of selling them one hundred cases of liquor, nor did Mr. Heitler and Mr. Perlman, or either one of them, in my pressence, discuss with Mossy Joy and Miller the question of selling them some Grand Dad Liquor. I lived at 4737 St. Lawrence Avenue before I moved to the hotel. I advertised in the papers and sold some of my furniture to different people. On Wednesday, the mover came and took a piano, a clock, Victrola and, I think, a suitcase to the hotel. I and my family stayed in the flat Wednesday night. My family was at the hotel when I got there Thursday night. I left Mr. Kirschstein about a quarter of nine and went right from the 51st Station to the hotel. I had never seen the man who ran the hotel, but had seen Mrs. Lyons about a couple of weeks previous, when we got the rooms. I did not leave the hotel again that night. On Thursday, September 30th, at nine or nine thirty or between nine and nine thirty, I was not in Perlman's saloon. On Friday morning, October 1st, I left the hotel about a quarter after eleven. I did not go to the brewery at all that day. My wife has been an invalid for the last eighteen years. My nephew, Ben Rodkin, and I drove in his machine to 4737 St. Lawrence. I do not drive a car. I had left in the flat a bedroom set and a dining room set, which my wife had sold to someone who was going to call for it. Rodkin and I started packing up some clothes and groceries and canned goods. The people who bought the dining room set and the bedroom set came and took them away. I stayed in the apartment until about a quarter of three or three o'clock, when a man by the name of Bernstein came. I had met him a couple of days before and told him I was breaking up housekeeping and had a rowing machine which he could have if he wanted it. We belong to the Covenant Club and he is a teacher there. I had not left the apartment from the time I got there in the morning until Bernstein arrived. Rodkin was with me all the time. It took about an hour for the people to move

out the dining room set and the bedroom set and then I
313 packed up some clothes and brushes and baskets and other
things left around there. I took Bernstein downstairs and gave him the rowing machine and went to 4750 Champlain with Bernstein to get the pulleys, which I had left there when I sold the building. My nephew went with me to Champlain Avenue. From Champlain Avenue, I went back to the flat and turned the keys in to Mrs. Geiger, the colored woman who bought the building. This was about three fifteen or three thirty Friday, the 1st of October. We then left and I had some linen, some groceries, a few cans of jam and sardines and other stuff that I had around the house, which I took to different relatives. The hotel where I live is on the American plan and we pay for room and board whether we eat there or not. After turning in the keys, we first drove to Rodkin's house, on Calumet between 51st and 52nd, and left some sugar, a few boxes of sardines and a few other things. I met his wife there and his little girl. This was about a quarter of four. Then, we went to 26th and Wallace to Mrs. Goldman's, who is a cousin of my wife by marriage. I stored some linen there and left some stuff with them. Rodkin went into the house with me. We were there about ten or fifteen minutes. Then we drove to 31st and Emerald to my sister's, Mrs. Minnie Rodkin, mother of Ben. We got there about a quarter of five or five o'clock. I brought up a bushel basket, which contained a can of olive oil and a few cans of tomatoes and sardines and catsup and worcestershire sauce and a few things like that. My nephew carried in about thirty pounds of sugar in a bag. Mrs. Rodkin was lighting candles at the time I went in. It is an orthodox Jewish custom for the women to light candles every Friday when it begins to get dark, as that is the time our Sabbath begins. I was there about fifteen or twenty minutes. From there we drove home and I stopped at a drugstore at 35th and State Street. When I stopped at Mrs. Rodkin's, I saw her little girl Janet. Rodkin went with me to the drugstore, the Walgreen Drug & Chemical Co., in
which I was financially interested. This was about five-
314 thirty, and I stayed there about fifteen or twenty minutes.
I have been in the habit of going into that drugstore every night if I were in town. From there Rodkin and I went to the hotel. He left me at the hotel. I arrived at the hotel about ten minutes of six or six o'clock, and went upstairs and washed up. I had had no meals in the hotel up to that time, except breakfast Friday morning. I stayed in the room about half an hour or twenty-five minutes and then went to supper. My family was there when I arrived, except I do not think my big boy was there. We went to dinner between six thirty and seven thirty. After dinner, I went out in the lobby and smoked a cigar. The restaurant is on the first floor and the sitting room is on the same floor. I was in the sitting room when Mr. Lyons called, "Greenberg, a couple of gentlemen are looking for you." I walked into the lobby and my nephew and Stone were there. Stone used to be a neighbor of mine when I lived at 4750 Champlain. I had often gone out to the movies with Stone before. I met him in the lobby about eight or a quarter

after. Rodkin and Stone went upstairs with me and we stayed there half or three quarters of an hour. Then Stone, Rodkin, my little girl and I went to the movies at the New Park Theatre. We left the hotel about nine or a little after. I do not remember what show we saw. I sat with Mr. Stone, and the little girl and Rodkin sat together. We all left together about ten thirty or twenty minutes to eleven. I did not leave the theatre from the time I went in until I left to go home. Stone and Rodkin left and my little girl and I stopped and bought some fruit and went home. We reached the hotel about eleven o'clock, when I went to bed. I was not at 63rd and State Street or 61st and State Street, on Friday, October 1st, 1920, at any time, nor was I, on that day, south of 52nd Street. I was not standing under the elevated at 61st or 63rd Street on Friday, October 1st, nor did Greengaard come up and introduce Harry Frank to me, nor did I tell Harry Frank or Louis Greengaard or anyone else at any time on Friday, October 1st,
315 1920, that they were having trouble moving the car. I did not see Harry Frank, Mickey Frank, or Louis Greengaard on Friday, October 1st, 1920; nor was I in the vicinity of 83rd and Vincennes or the Rock Island tracks at any time during that day; nor was I riding in an automobile with Michael Heitler and Nathaniel Perlman, or either of them; nor was I near, nor did I see, a carload or freight car on the tracks near 81st and Vincennes on Friday, October 1st, 1920; nor did I stand at the door of a car there with a piece of paper in my hand and say, "Mickey Frank gets 105 cases," nor did I have anything to do with unloading a carload of Grand Dad Whiskey, or any other whiskey, on the 1st of October, 1920, at any hour of the day or night; nor was I, on the night of October 1st, taken down Michigan Avenue in a machine with Mossy Joy and John Miller and let off at my hotel; nor was I at a freight car anywhere in the City of Chicago on the night of October 1st; nor did I hear Harry Frank and Louis Greengaard come back and say they had ben stuck up; nor did I see or hear Mossy Joy come back and say they had been stuck up; nor was I in Perlman's saloon on the night of Friday, October 1st, about eleven or twelve o'clock, or between twelve o'clock Friday night and two o'clock Saturday morning. I did not go to the brewery on Saturday, but stayed around the hotel until twelve or one o'clock and then went to a Turkish bath at the Palmer House, where I stayed until about six o'clock, when I went home and remained there the rest of the day. I was not in Perlman's saloon on Saturday, October 2nd, 1920, between one and two. I did not meet Joy and Miller in Perlman's at any time on Saturday nor did I, at any time, hear Mr. Perlman or Mr. Heitler say to Joy and Miller in my presence that they would give them back 50% in cash and 50% in liquor, or that they had another car coming in every week. I did not meet Mickey Frank in Perlman's saloon on Saturday, October 2nd. I did not, at any time after I moved to the hotel, go with Mr. Heitler or with Mr. Perlman to the saloon of Mickey Frank, nor did Mr. Heitler go into the back room with him while Mr. Perlman and I stayed outside

or at the bar. I have never been in Mickey Frank's place.
316 I did not make any arrangement with Mr. Heitler and Mr. Perlman, or with either of them, or with anybody else, with any of the defendants in this case, or with anybody not named in this case, to return seven thousand dollars, or any part thereof, to Mickey Frank or to Louis Greengaard or to Harry Frank. I did not, at any time, on Saturday, October 2nd, see Mr. Heitler throw a check at Miller or at Joy in Perlman's saloon, nor have I ever seen them together at any time. I did not have anything to do with selling any liquor to the witness Fitzpatrick, nor did I ever get any money from him, nor did I have anything to do with selling any liquor to Mickey Frank, Harry Frank or Louis Greengaard. I did not go to the Englewood Police Station on Sunday, October 3rd, nor did I know anything was going on there, nor was I asked to go, but I was home at that time. I did not say to Mossy Joy, on Friday night, October 1st, or early Saturday morning, October 2nd, that I had just moved to a hotel in the vicinity of 47th and Michigan Avenue. I have never spoken to Joy in my life. The first time I knew that anyone claimed I was mixed up in this deal was when the witness Callahan, about the middle or the last of November, came to the office and said that Mr. Clyne, the District Attorney, wanted to see me. I told my boss where I was going and Mr. Callahan took me to this building. I talked to Mr. Walker in the presence of a girl who was writing things down. He talked to me about this matter. I answered all the questions he asked me, and he talked to me about an hour. He said that he was going to put me in the penitentiary if I didn't come clean and I told him that I had told him everything I knew. Then the girl went out and he told me again to come clean or I was going to the penitentiary. Then he took me to another room and Mr. Kelly came in. He then asked me if I would come back if he let me go and I told him that any time he wanted me, all he had to do was to call up the brewery and I would come over. That was the last I heard of it until they had a warrant out for me. When Mr. Callahan came to the brewery and asked me to come down, I did not telephone or see a lawyer, but went right *right* down to see him. I was never present when any money was paid by Miller and Joy, or by Miller alone, or by
317 Joy alone, and neither of them ever paid me any money. On Friday morning, October 1st, I did not see Harry Frank and Louis Greengaard in Perlman's saloon, as I was not there; nor was I present when both of them, or either one of them, paid over any money to anybody.

Cross-examination.

By Mr. Glass:

The first saloon which I had, at 1607 South Wabash Avenue, gave to my father about twenty years ago. I had it for about six or seven months. I then started a place in partnership with my brother-in-law, Rodkin, on Cottage Grove Avenue, between 37th and 38th Street. I kept this place about five or six months. It didn't

pay and I gave it to my brother-in-law. I then went to work for the National Brewery for about four or five months and, being on the route, found myself a corner at Addison and Robey Streets and started a saloon. Then I started a liquor store at the corner of Belmont and Hoyne, with Eddie Herr. I think I sold the saloon and started a saloon in the loop with Eddie Herr. I had this place about a year, sold it and went to the World's Fair at St. Louis, where I had an agency for novelties with Eddie Herr and two other fellows. When I came back, I think I started tending bar for Herman Tepletz on Madison and Laflin Street- for a couple of years. My wife was in California at that time and I was unsettled in my business. After that, I got a place at Canal and Lake, had it for about a year and ten months and sold it. I then got a lease on the corner of Curtis and Madison with Eddie Herr and kept that place a couple of years. The place at Madison and Curtis did not pay for two, so I sold my half and went to work for the Wacker & Birk Brewery Company, as a bottle beer agent. I have been working for them from that time on. I was also in the commission business in Evanston when I was a kid. I have known Mr. Perlman about twenty-five years. He is one of my customers. We opened a place at Wells and Washington six months before Prohibition came into effect, as a partnership of Perlman, Kennedy & Greenberg. The fix-
318 tures belonged to Wacker & Birk, but the lease belonged to Perlman and Kennedy. I have known Mr. Heitler about fifteen years and used to sell him beer. I have seen him in Perlman's saloon, where he used to drop in occasionally. I first became acquainted with Mr. Heitler when I first started selling beer. When I had an interest in the saloon, I went there more often than to other customers, but after I sold my interest I would drop in there once or twice or three times a week, if I was in the neighborhood. There was never anything said between Perlman, Heitler and myself about whiskey deals in that place at any time. There is a lunch counter in the saloon, tended by a colored woman. I suppose she knows Perlman and me, but do not know if she knows Heitler. The lunch counter is let out as a concession. In August and September, 1920, I think there was one bartender there, Frank Grossman. While I had an interest, Perlman and Kennedy tended the bar. I belong to the Elks' Club, but have only been in the Elks' Club once or twice. I do not remember whether or not I was in Perlman's saloon on September 29th, but I might have been. I have never had any whiskey deals with Mr. Perlman or anybody else. I do not know William Moore and did not meet him on Clark Street, near Adams, last week or while this trial has been going on. I do not know Mossy Joy and never saw him in Perlman's saloon. I do know Miller, but I did not see him in Perlman's saloon on the 29th of September. I know Greengaard by sight, but have not talked to him for a couple of years. I did not see him on September 29th or 30th, or October 1st. I have never known Harry Frank, but I knew Mickey Frank by sight, but never talked to him. I have met a dozen men talking about oil propositions in Perlman's saloon. Mr. Perlman and I did

not tell this man Moore to go to Al George's place and see Joy and Miller. It is not a fact that he came back or that I told him I had made a deal with Joy and Miller; nor did I tell him he would get $2.00 a case; nor did I hear Mr. Perlman say that; nor did Moore call me up on the telephone in Perlman's saloon and ask me how the deal came off; nor did I say, "It come off a plenty, our
319 stuff was taken," or words to that effect. I do not know Caruso. I was never in an automobile with Mossy Joy on the South Side visiting various saloons. He did not let me off at the Lyons Hotel on the night of October 1st, or at any other time. I did not know George Hans, the police officer, until I met him in the courtroom. When I first lived at 4737 St. Lawrence Avenue, the building was owned by one Barney Cohen and was then sold to some colored people by the name of Geiger. I moved some stuff about seven or eight o'clock on the 29th. The moving men took the piano, a clock and the Victrola over to the hotel. I was not at the flat the next day, Thursday, at any time. My wife and my father attended to the moving on Thursday. On October 1st, Rodkin and I went to the flat on St. Lawrence Avenue. My wife was not with me. I got there about eleven thirty and stayed there until three or half past three. I turned the keys over to Mrs. Geiger or her daughter, I don't remember which, but I think it was the daughter. I do not know whether or not I was eligible to vote from the Lyons Hotel, but I know I voted from there at the Presidential election in November, which was the first time I had voted from that place. At the time I turned in the keys to Mrs. Geiger's daughter, nothing was left in the flat. It is not a fact that there was nothing left in the flat after September 30th, for a man from Indiana Harbor took out a bedroom set and a dining room set on Friday. I had never met Mr. Lyons until Friday evening, October 1st. I did not sign my name on the hotel register. I got to the hotel about six or a quarter of six on the evening of October 1st and then went upstairs. My Lyons called me while I was smoking in the sitting room and then I met Mr. Stone and Mr. Rodkin. Then we went upstairs and about three quarters of an hour later we went out. It is not a fact that I went with them without any of my family. I do not know James O'Leary, but I have read of him in the papers. I never saw him in my life until I saw him in the courtroom. I was not in Perlman's saloon on the 29th or 30th, and I do not know if Simmons
320 was there. I was not south of 52nd Street on October 1st. I have known Louis Greengaard by sight about three years, but have spoken to him but once or twice. I never did any business with him. I was not in Perlman's saloon on the 29th or 30th of September, or the 1st of October, and did not see him there. I was not on 63rd Street on October 1st, nor at State and 63rd. I did not see Mr. Perlman that day. I went to the brewery on September 30th and at noon had lunch at Clark's Restaurant, Michigan and 22nd Street. From Clark's Restaurant, I went back to the brewery. I do not know where the Michigan Avenue Trust Company is and I have never been there. The entire office is 40 x 50 and the agents' room is about the size of the jury box. There were four agents

there, Mr. Ryan, Mr. Sennet, Mr. Becker and myself. The room is open, having no doors, and people pass through it to go to the boss' room. I did not tell Mr. Ortseifen that day that I was going out, as I did not go out. On Wednesday, there were a lot of things left in the apartment and some people came and took away a lot of stuff my wife had sold them. On Thursday, there was a bedroom set and a dining room set, some clothing, linen and groceries in the apartment. I saw all these things in there. My nephew was with me. No moving men were there October 1st. I got to the flat on Friday about eleven fifteen or eleven thirty and left about three thirty. That day I saw Mrs. Brown at 4750 Champlain Avenue, Mrs. Geiger and her daughter, Ike Bernstein and my nephew, who was with me. I had an interest in and was treasurer of the drugstore up to the first of January. I used to drop in every evening and get the reports. I cannot remember who I saw in there that evening as there are about eighteen or twenty employes. The employes knew me and knew that I had an interest in the store, but they did not know I was treasurer. This store is still operating. I do not know the names of the employes, as I did not manage the store. The drug company had about twenty-two stores, but I was treasurer of just this one store. The brewery had had a lease of the store and after the saloon license was revoked, I got the lease and got Mr. Walgreen interested in the store. I did not handle the money from this store. For a
321 while I signed checks, but afterwards all the money was handled by the manager. At that time the bank account was kept at The Franklin, on Michigan Avenue and 35th Street. That night I was in the store about fifteen or twenty minutes. I do not remember who I saw there that night. After leaving the store, I went to the hotel in my nephew Rodkin's machine. I have never had any business dealings with Stone and I do not know his first name, as I always called him Stone. I knew him years ago when he was with the B. & R. Brewery. I understand that Stone knew that I was at The Lyons, because he met my nephew, who told him. I do not remember the name of the picture I saw that night. Louis Greengaard did not introduce Frank to me, nor was I at the Rock Island tracks at Gresham Station on October 1st, 1920. I do not know Joy, was never in an automobile with him and did not cover the South Side. I do not remember if I was in Perlman's saloon before Wednesday of the last week of September, but I might have been. I sometimes went there once or twice a week, as I dropped in to see any of my customers if I am in their neighborhood. I would stop in at different times of the day. I have seen Heitler in Perlman's saloon several times. On the night of September 30th, I had dinner at the office of the brewery company. Mr. Ortseifen, Mr. Kirschstein, Mr. Ryan, Mr. Sennet, the cashier, Fred Baha, myself and the colored fellow who waits on the table were there. I do not remember who sat next to me at the table, as we have no regular seats. Everyone who works in the office is always there the last day of the month.

Redirect examination.

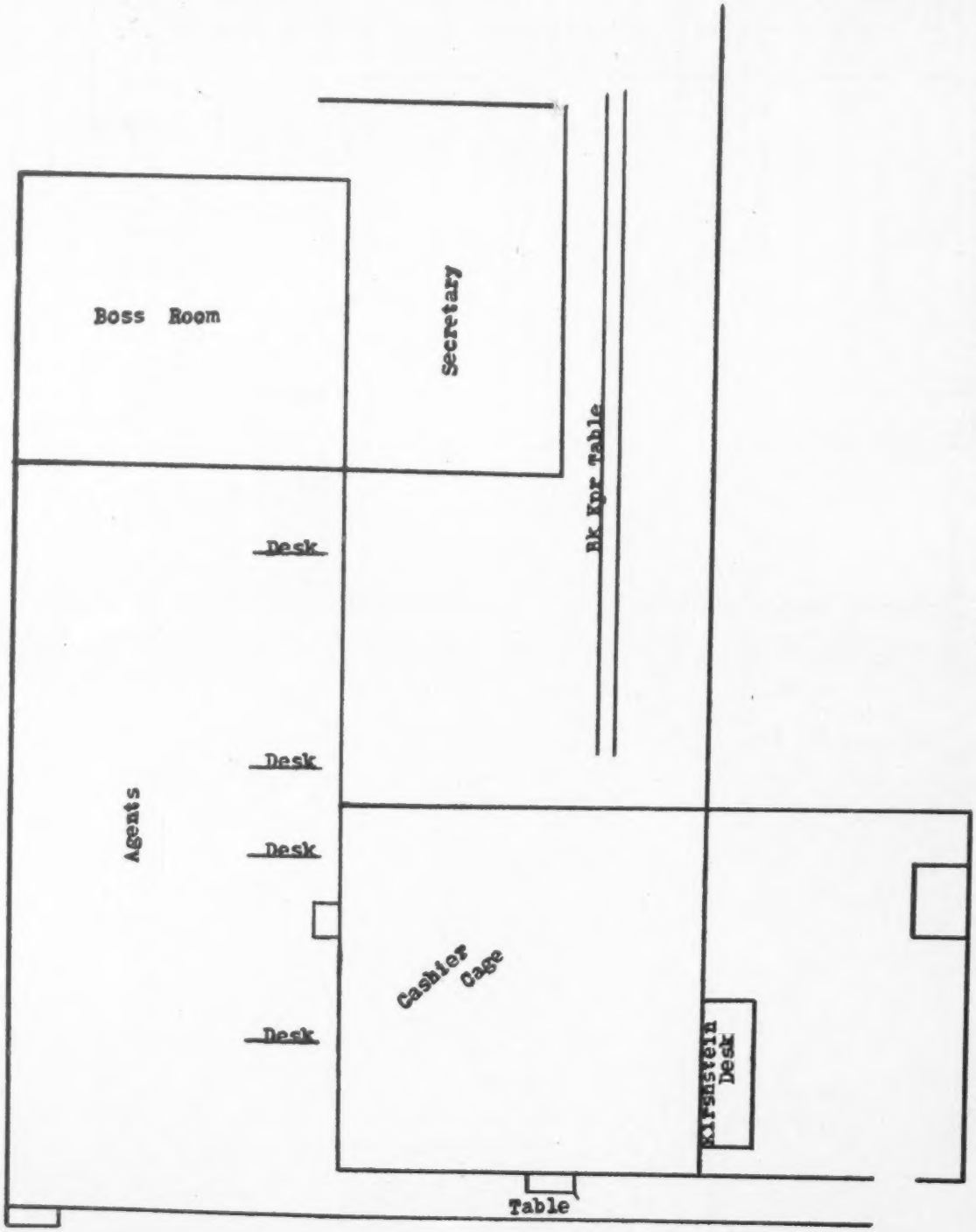
By Mr. Kirkland:

Greenberg's Exhibit No. 1 of March 1, 1921, is a rough sketch drawn by me showing the lay-out of the office.

Whereupon, Defendant Greenberg's Exhibit No. 1 of March 1, 1921 was offered and received in evidence, and was and is in words and figures as follows, to wit:

(Here follows defendant Greenberg's Exhibit No. 1 of March 1, 1921, marked page 322.)

DEFENDANT GREENBERG'S EXHIBIT NO. 1 OF MARCH 1, 1921.



323 The partition between the boss' room and the agents' room is plain glass, like window glass. As one enters the door, there is nothing to obstruct the view of the entire office. I have not been in the Elks' Club for about a year or a year and a half. I do not remember to whom I spoke in the drugstore and there are no books in which I made any entry.

Mrs. Frank Brown.

Direct examination.

By Mr. Symmes:

My name is Mrs. Frank Brown. I am a housewife and live at 4750 Champlain Avenue. About a year and a half ago, I bought the house where I now live from Mandel Greenberg. I bought the house in July, 1919, and took possession October 1, 1919, when Mr. Greenberg moved out. When he moved out, he left some pulleys to an exercising machine in the basement, which he had fixed up as a sort of a gymnasium, and he asked me to keep them until he found room for them and I agreed. He took them away October 1, 1920. He moved to St. Lawrence Street. I do not know the number, but his house is right back of mine, across the alley. I do not remember the exact time of day he came for the pulleys, but I think it was between four and five. Someone was with him, but I do not know who. He told me when he came for the pulleys that he was moving that day.

Cross-examination.

By Mr. Glass:

The house that Mr. Greenberg sold me was not the house he moved from on October 1st, 1920, but was across the alley on St. Lawrence. When Mr. Greenberg and the two gentlemen came for the pulleys, they were in the house about fifteen or twenty minutes, between four and five. I cannot describe the other gentlemen as I paid very little attenion to them. Last Friday, someone came to the house and asked me if I remember that Mr. Greenberg had called for the pulleys and I said yes. He did not ask me what date it was, but after he left I remember by looking at the calendar that it was October 1st, and I remembered also that Mr. Greenberg told me that he was moving on that day. I do not know that Mr.
324 Greenberg moved on September 30th or 29th.

Redirect examination.

By Mr. Symmes:

I know Mrs. Greenberg. I do not remember what day of the week October 1st was on.

Mrs. LULU GEIGER (Colored).

Direct examination.

By Mr. Symmes:

My name is Mrs. Lulu Geiger. I live at 4737 St. Lawrence, which is a six flat building. I purchased the building on March 15th and Mr. Greenberg lived in one of the apartments until the 1st of October, 1920. I think Mr. Greenberg sold most of his things and they were taken out at different times. I do not remember when he stopped sleeping there, but he delivered the keys to me the 1st of October about three o'clock in the afternoon, or a little after, in the presence of my daughter Mrs. Simmons, at the front door of my flat. I know it was the 1st of October, because all the tenants gave up their keys at that time and his lease was up at that time. I think his wife was with him, but I am not sure. Someone from the government called to see me last Friday or Saturday and asked me if I knew the Greenbergs and when they moved. I told him I knew them and that they moved on October 1st. My daughter Katherine Simmons is in St. Luke's Hospital and is not able to get out. The government man told me that he had seen Mr. Greenberg at some car on the 1st of October. I did not say anything about it, but my daughter did.

Cross-examination.

By Mr. Kelly:

I first knew that I was going to be a witness in this case last night when Mr. Greenberg asked me to come to court today. I had talked to no one, except the government man, before last night. I don't remember the exact day the government man was at my house, but it was three or four days ago. I know Mr. Greenberg turned over the keys on October 1st because I put down an account of my leases that way. His lease expired September 30th, but the keys
325 were given to me October 1st. I did not see any moving going on September 29th, as I am out quite often. I think he had some things moved out on September 30th, but I do not know whether it was in the afternoon or morning. I stayed at home October 1st because I expected some people to move in. I did not see Mr. Greenberg on September 30th or on September 29th, but after about three o'clock, October 1st, he came to the door of my flat and gave me the key. Mrs. Greenberg was with him. My daughter took the key herself and I do not know whether or not Mrs. Greenberg gave it to her. My daughter had the keys in her hand when I came from the dining room to the hall door. On Saturday, I talked to Mr. Symmes and told him that Mr. Greenberg had moved on October 1st. I do not remember anyone coming to my house a week ago and talking to me about this case. I saw some things moved out of the flat on September 30th and again on October 1st,

about noon, but not on September 29th. I do not know if Mr. Greenberg was there at that time as I only saw him when the key was delivered.

Redirect examination.

By Mr. Symmes:

I talked to the government man before I talked to you (Mr. Symmes) at your office.

Mrs. Flora Goldman.

Direct examination.

By Mr. Symmes:

My name is Mrs. Flora Goldman. I live at 615 West 26th Street. My husband is a tailor at the same address. We have lived there thirty-six years. I have known Mandel Greenberg thirty-five years. His wife is my counsin. In September, 1920, Mr. Greenberg lived on St. Lawrence Avenue near 47th Street. I went to see them in September. He moved from there to the Lyons Hotel, where I also visited him. I remember that Mr. Greenberg came to my house with Benny Rodkin in the afternoon in the early part of October, but I do not remember the date. He brought me some sugar and a few articles he had left from his home, together
326 with some of his linen to store in my house. I am sixty-eight years old. He said he was moving that day and going to a hotel and the things he gave me were things he had left which he would not need in the hotel.

Cross-examination.

By Mr. Kelly:

My Greenberg spoke to me about a month or so ago and asked me if I remembered when he was at my house and I told him yes and he asked me to testify. He asked me if I knew the date and I told him it was the first part of October. I saw them in September in their flat, but I do not remember the date when they told me they were going to move. There is nothing by which I can fix the date except that I knew they were moving and I imagined it was on October 1st. They brought the things to my house about four o'clock in the afternoon. It was not quite dark. I have not talked with Mr. Greenberg about the case since I saw him, about a month ago. I do not remember exactly when I saw Mr. Greenberg lately.

HENRY PHILIP HAAR.

Direct examination.

By Mr. Symmes:

My name is Henry Philip Haar. I live at 735 Irving Park Boulevard. I am the Superintendent of Production or Brewmaster of the McAvoy Company, at their place of business 2349 South Park Avenue. I have been with them three and one half years. At the McAvoy Brewing Company on the last day of the month, about six o'clock, I meet the office force and men connected with the brewery at dinner. Since I have been with them, I have not missed any dinner except the one last night. I have known Mandel Greenberg since I have been with the concern and never knew him to miss one of the dinners. I was at the dinner on the last day of September, 1920. At that time, we were bringing out a new brew which we called "Old Brew", and it was of interest to me to talk with the agents in regard to possibilities of sale. The discussion was about how it would sell and how it should be merchandized, whether in
327 casks or in bottles. I discussed this with all the agents, including Mr. Greenberg. The dinner was between six and six thirty and came, I think, from a place at 23rd Street and Cottage Grove Avenue and was served by a colored waiter. That man (indicating a colored man then conducted into the courtroom) looks like the man wh usually serves the dinners. The discussion and dinner usually lasted till about seven thirty or eight o'clock.

Cross-examination.

By Mr. Glass:

I know Mr. Greenberg pretty well in a business way. During all the time I have been there, I do not remember that any of the agents have missed the dinners, as their absence would be commented upon, due to the fact that we usually discuss our product and get their general opinion, as I have to work in co-ordination with them. I would know if one of the agents was absent, because I wish the opinion of each of them. I based my opinion as to Mr. Greenberg's presence upon the fact that we always discussed our product at the dinners and on the fact that on September 30th I discussed in particular the new beverage. I do not remember any conversation with Mr. Greenberg aside from asking him how he thought it would sell and if the public would like it. On September 30th, I met Mr. Greenberg in the office about five o'clock in the afternoon. I also saw Mr. Ortseifen, Mr. Ryan, Mr. Becker and Mr. Sennet at that time, around their desks talking to one another, or in the main office. My statement that Mr. Greenberg was present on September 30th is not based merely on the fact that he was generally there on the last of the month or that the agents were supposed to be there. I was talked to about this case about three or four days ago, but nothing

was said to me about September 30th being the time we had discussed the new beverage. I do not think it would be possible for one of the agents to miss a dinner without my knowing it, although the discussion would, of course, go on even if anyone were absent. I have no positive knowledge of where the dinner was ordered, but think it was ordered at Collins', because Mr. Ryan generally orders it there. I always asked Mannie how his family was and I
328 did so on September 30th. He said his wife was not well and that he expected he would have to break up housekeeping. I am not positive as to whether or not I saw Mr. Greenberg on September 29th or October 1st.

JOHN BOGGS (Colored).

Direct examination.

By Mr. Symmes:

My name is John Boggs. I live at 15 W. 50th Street. I am a waiter in Ben Collins' place at 23rd and Cottage Grove and have worked there seven years. I have known Mr. Greenberg about a year or two. I serve meals at the McAvoy, and Wacker and Birk Brewing Companys, on South Park Avenue between 23rd and 24th, the last of every month and have been serving meals there about three years. I wait on the table and serve about ten or twelve people. Since I have known Mr. Greenberg I have always seen him at the dinners.

Q. What is your recollection as to whether Mannie Greenberg was there and you served him that night (September 30th)?

A. Well, the door was locked downstairs and I come in up South Park Avenue and I was rapping on the door so he stuck his head out of the window and he says, "That you John?" and I says "Yes, sir" and he said "All right, I will be down and let you in" and he said "It is a shame that they don't send some waiter over to carry that heavy basket with you," and I said "Yes, it is" and he said "I will help you to carry it up," and I said "Well, I know they have got waiters up there to help me" and he said "I will help to carry it up there anyway" and I said "All right." So he grabbed ahold of the basket and helped me carry it up.

I have never missed Mr. Greenberg since I have been serving meals there. I generally serve the meals from a quarter after six to a quarter after seven.

Cross-examination.

By Mr. Glass:

I was first spoken to about this case last Sunday and was
329 asked about September 30th. I think there were nine at dinner that evening, but I do not know them all by name.

The Court: Was he there that night, was Mr. Haar there that night?

A. Mr. Haar? Well, I do not know him by name, sir.

The Court: The man that you saw on the witness stand when you stepped in?

A. Yes.

The Court: Was he there last night?

A. No, sir, I don't think he was there last night.

I know Mr. Kirschstein, he wears glasses. There were seven there last night. On September 30th there were about nine or ten. Mr. Haar was there September 30th. I do not know Mr. Ortseifen by name. The chef makes out the ticket for the meal and they pay me at the brewery. Then I take the money and ticket back. I do not remember exactly how many were at dinner at the end of August, but I think it was ten or eleven, because it was a big dinner and a big basket. I do not think the cashier Mr. Bayha was there September 30th.

Q. And you do not know him better than you know Mannie Greenberg?

A. Well, no, not any better, because Mr. Mannie always generally helped me set up the table.

I think I was paid $23 for the dinner that night. I straightened up after dinner and when I left every one was there who had had dinner.

ISADOR H. STONE.

Direct examination.

By Mr. Symmes:

My name is Isador H. Stone. I live at 4824 Champlain Avenue. I am not related to Mannie Greenberg. I am a confectionery jobber and factory representative. I have known Mr. Greenberg about ten or twelve years. I live in the same neighborhood where he lived the past four years. I don't know where Mr. Greenberg lived in
330 September, 1920, but I know that he lives now at the Lyons Hotel. I first went to the Lyons Hotel on Friday, the first day of October, with Ben Rodkin. I met Mr. Rodkin in the evening in front of one of my customer's place, Mr. Garber, on 51st Street and Calumet and asked him where he was going. He said he was going to a show with Mannie and was walking toward his house. I asked him why he was walking west and he replied that Mr. Greenberg had moved yesterday and that he now lived on Michigan Avenue, at the Lyons Hotel. I went into the Lyons Hotel and met Mr. Greenberg in the lobby. He came out of the sitting room or dinning room and we went upstairs with him. This was about eight o'clock. I talked with Mrs. Greenberg. I stayed in the hotel about twenty minutes or half an hour and from there Mr. Greenberg, Mr. Rodkin, Mr. Greenberg's little girl and I walked back to 51st Street to the

New Park Avenue Theater and went to the moving picture show. Mr. Greenberg and I sat together through the show. I left them in front of the theater about ten thirty. I remember it was Friday, October 1st, because I had asked my wife to walk with me toward Garber's and go to a show and she had said that she was tired, so I went alone to Garber's. I generally call on the trade around the first of the month.

Cross-examination.

By Mr. Glass:

I have been a confectionery jobber and factory representative about ten years. I first met Mr. Greenberg when I was chief clerk for the Bartholomae & Roesing Brewing Company. The last four years I have lived on Champlain Avenue within less than a block of Mr. Greenberg and we used to meet once or twice or three times a week or maybe not at all. Sometimes I met him in the drug store on the corner or in the grocery store or in the show house or going by it or coming up the street as we passed his house. He visited my house with his wife once or twice. Before I met him at the Lyons Hotel, I had not seen him for about three weeks or a month. I first
331 learned that he had moved when I met Mr. Rodkin on 51st Street that night. I recollect it was a Friday night because I generally go out with my wife on Friday and that it was October 1st because I called on Mr. Garber, as I was to call on him about that time, on the first of the month. Garber is located on 51st Street, near Calumet, across from the theatre. I called on him that evening. Another reason for remembering, is that Mrs. Greenberg apologized for things being upset and said that they had just moved in. I have gone to the picture show with Mr. Greenberg many times before. I do not know Mr. Perlman or Mr. Heitler. When I used to go to the show with Mr. Greenberg it was not by appointment, but just by happening to meet him. Many times, in passing by his house, they would ask where we were going and then we would all go to the show. I do not know Mr. Lyons, but Mr. Rodkin walked in ahead of me and asked some man where Mr. Greenberg was and when Mr. Greenberg came out.

Redirect examination.

By Mr. Symmes:

Mr. Greenberg came out of the sitting room or dining room, I don't know which, but it was an ante-room right off the hallway as you enter.

HASCAL L. LYON.

Direct examination.

By Mr. Symmes:

My name is Hascal L. Lyon. I live at 5020 Michigan Avenue, where I keep a hotel. I am also a Deputy Sheriff for Mr. Hunter. I have kept the hotel since May 16, 1917. I first saw Mr. Greenberg on October 1st, 1920 between six and seven thirty at night in the dining room when he came in with his family for dinner. I do not know what time they finished dinner, because they were still eating when I came out. After dinner, two gentlemen called for him. I do not know one of them, but I have learned since that the name of the other one is Benny and that he is a relation of Mr. Greenberg's. I was sitting in the office by the switchboard and the gentlemen came up to me and asked for Mr. Greenberg and I went and told him there were two gentlemen to see him. I do not remember whether I went into the dining room or into the parlor, but he
came out and met them. I do not know where they went. I
332 remember it was October 1st because it was the first day the
Greenbergs were in for a meal. When I came home on Thursday, the young lady in the office asked me if the floor would be hard enough to walk on in their suite, as I had varnished it a couple of days before. I never saw any of the Greenberg family prior to the evening of October 1st. They moved some furniture into the hotel on Thursday. I remember helping my houseman in with a big box.

Cross-examination.

By Mr. Glass:

Someone, on the evening of October 1st in the dining room, as the Greenbergs came in, asked me if that was the new family. I do not remember who told me that one of the gentlemen was called Benny, but I have heard him called that, for he probably comes over every other night or so. I could not say how late I was in the office that evening, but we usually close up about nine o'clock. I did not see Mr. Greenberg and his daughter go out of the hotel that evening, nor did I see Mr. Greenberg come back to the hotel. I leave the front doors open so anyone can come in. I do not know whether I called Mr. Greenberg from the dining room or parlor. The lobby of the office is only about eight feet wide and sitting at the switchboard, my back is to both doors. When the two gentlemen called for Mr. Greenberg, I got up and called him, but I don't remember at which door. When he came, I went back to the switchboard as the phone is pretty busy between seven and eight at night. I could not say positively that nothing was moved into the hotel on the 29th of September, but it was on Thursday that I, with my houseman, moved the stuff from the hall into the apartment. I d

not remember what time the two gentlemen called, but I am sure it was after six thirty, because that was about the time I place Greenberg as coming into the dining room; I think they called before eight. I do not remember whether or not the dining room doors were closed. We close them at seven thirty.

Redirect examination.

By Mr. Symmes:

333 The defendant Mandel Greenberg is the man to whom I refer and the person you pointed out as Benjamin Rodkin is the one I mean by Benny.

Recross-examination.

By Mr. Class:

50th and Michigan is about one and a half miles from 63rd and State Street. I keep a hotel register, but it is a loose sheet and fits in corners like a blotter. The register does not contain many names, as the hotel is a family hotel and most of the people have been there longer than I have. I do not accept any transients.

JAMES J. WALSH.

Direct examination.

By Mr. Symmes:

My name is James J. Walsh. I live at 6848 East End Avenue. I am a Captain in the Fire Department, stationed at 47th and Wentworth. I have been with the Fire Department of the City of Chicago over seventeen years. I have known Mannie Greenberg very well for over thirty years and know the people with whom he associates. His reputation among his associates as a peaceful and law abiding citizen and his reputation for truth and veracity is good.

Cross-examination.

By Mr. Kelly:

Mandel Greenberg and I were boys together. I have visited at his home. The last time was about a year ago. The old friends we had when we were boys continued to associate together. Among his associates are Ex-alderman Hickey, who is now dead, and Sgt. Hogan. I do not recall any others in particular at the present time. He used to drop in the engine house every month or so. We used to visit each other's homes when I lived on St. Lawrence. I knew he had been in the saloon business and the last place that I know of was 35th and State Streets. I did not know he kept a saloon at Fifth Avenue and Washington.

Redirect examination.

By Mr. Symmes:

When I lived on St. Lawrence Avenue I lived about a block from Greenberg. I lived there for five years and moved in May, 1920.

334 MAURICE J. CLARK.

Direct examination.

By Mr. Symmes:

My name is Maurice J. Clark. I live at 2306 Cottage Grove Avenue. I am a Deputy Assessor of Cook County and have been for three years. For the ten years prior to that, I was Deputy Clerk for the Municipal Court of Chicago. Before that, I was a clerk in the County Clerk's Office. I have known Mandel Greenberg since I returned from the Spanish-American War—in all about twenty-one years. I met Greenberg because our regiment left from and returned to, 16th and Michigan and he had a place at 16th and Wabash, a block from the armory. Since that time I have met Mr. Greenberg off and on, but I could not say definitely how many times a week. I know his reputation prior to October 1st, 1920, for truth and veracity among the people in the vicinity where he lived and where he transacted business and that reputation is good.

Cross-examination.

By Mr. Glass:

I do not know whether he kept his saloon at 16th and Wabash open on Sunday, but I was not in there on Sunday to my knowledge. I know Mr. Greenberg lives now on Michigan and 61st and used to live at 51st and Calumet, but I do not know the street number. I have talked to people in the neighborhood about Mr. Greenberg, among them Peter J. Curley, a mail carrier who lived at 49th and Indiana. I met Curley on the street and told him I had seen another friend of his, Mannie Greenberg, and he replied that he saw him quite often, that he lived out his way, that he was a fine fellow or something like that. I could not say that I had talked to anyone who had had business dealings with him. I also talked to Col. Jasper T. Darling, who used to live out our way. I could not say that I had talked to anyone in the location of Wells and Washington Streets about Mr. Greenberg. I based my opinion as to his reputation upon what I have seen and heard traveling through the city among the people I knew and who knew me. I might have talked to other people about him besides Darling and Curley.

335 Redirect examination.

By Mr. Symmes:

I have known him since I came back from the Spanish-American War and from that time to October 1st, 1920, I have never heard a word to his discredit.

JOHN C. SLADE.

Direct examination.

By Mr. Kirkland:

My name is John C. Slade. I live in Evanston. I am a lawyer and a member of the firm of Winston, Strawn & Shaw, with offices in the First National Bank Building. I have known the defendant, Mandel Greenberg, about ten years and have seen him frequently in our offices. My firm represents the Wacker and Birk Brewery and the McAvoy Brewing Company. I am familiar with Mr. Greenberg's reputation for truth and veracity and his general reputation as a law abiding citizen in Chicago among the people with whom he associated and did business prior to October 1st, 1920. That reputation is good and knowing his reputation, I would believe him under oath.

Cross-examination.

By Mr. Glass:

Mr. Greenberg has been in my office in regard to matters involving contracts and arrangements with other people and the keeping of engagements. I have talked about him with various people in our office, with his associates and with people from time to time with whom he may have had business relations. I do not know where his residence is, but I know he is employed by the Wacker and Birk Brewing Company. I also know that he was in the saloon business. I could not say that I had talked to anyone in the locality of Wells and Washington Streets about Mr. Greenberg.

ARTHUR I. DONLIN.

Direct examination.

By Mr. Symmes:

My name is Arthur I. Donlin. I live at 5143 Calumet Avenue and
am and have been a contractor and real estate broker for ten
336 years. I have known Mandel Greenberg intimately for
twenty-five years and have lived in the same neighborhood where he lives for ten years and prior to that, I lived within a mile or two of him. I am familiar with his general reputation as a law

abiding citizen and for truth and veracity in the neighborhood in which he lives and that reputation is good. Knowing that reputation, I would believe him under oath.

Cross-examination.

By Mr. Kelly:

In the last six months I have seen Mr. Greenberg ten or twenty times and prior to October 1st, I would see him once or twice a week I have visited him at his home three or four times and was present at his wedding. I once bought some mahogany from the brewery through him, and again I represented a friend, Mr. Dave Lipsey, in getting an adjustment from the brewery which Mr. Greenberg represented. Mr. Greenberg now lives at 51st and Michigan and used to live at 47th and St. Lawrence Avenue. I know Mr. Greenberg is in the saloon business and the last place he had was at Fifth Avenue and Washington Street. I was in there fifteen or twenty times during the year he had it. I know he also had a place at 37th and Cottage Grove. I never knew Mr. Perlman. I know Michael Heitler.

JOHNIE CLAY (Colored).

Direct examination.

By Mr. Symmes:

My name is Miss Johnie Clay. I live at 4458 Cottage Grove Avenue and work in Mr. Perlman's saloon, at Wells and Washington Streets, making sandwiches. I have been working there for eleven months and I know Mr. Perlman. I work from seven thirty or eight in the morning to five thirty or a quarter of six. I have seen Mr. Heitler and Mr. Greenberg come into the saloon. The lunch counter is in front of the bar on the Washington Street or north side The settees and booths are on the west side. I can see the settees from where I stand making sandwiches and can see everyone in the settees, except one man when he is sitting down in the farther
337 settee. I never saw $10,000 or any $1,000 bills paid over in the saloon to anyone, nor did I see two men go in there any afternoon and count a lot of money in the booths. I never heard anyone talk over any whiskey deal in there or talk about Grand Dad Whiskey. I do not know Mossy Joy, Mickey Frank John Miller or Fitzpatrick. I never heard anyone talk about liquor there or saw any sold in the saloon.

Cross-examination.

By Mr. Glass:

I am pretty busy making sandwiches from noon until two o'clock I have seen Mr. Heitler and Mr. Greenberg come in. There are three settees and two people can sit on each side with the table between them. There is a kitchen downstairs in the basement. I g

down there to get my meat, but stay just a few minutes. There is a table, but no chairs, in the basement. I did not see anyone go downstairs, as my counter is away from the door. I do not know what time of the day Mr. Heitler, Mr. Perlman or Mr. Greenberg would come in. I never saw Mr. Perlman, Mr. Heitler or Mr. Greenberg all there together at any one time. I do not pay much attention to what is going on, as I tend to my work. Mr. Symmes talked to me last night about the case and asked me if I knew anything and I told him no.

Redirect examination.

By Mr. Symmes:

I can see into the three settees just as easy as I can see the jury.

Recross-examination.

By Mr. Glass:

The lunch counter is pretty high, but I could see over it and could see everyone in the settees, except one man of the four in the last one.

JOHN ANTHONY (Colored).

Direct examination.

By Mr. Symmes:

My name is John Anthony. I live at 3946 Indiana and am the porter in Mr. Perlman's saloon, at Washington and Wells. I
338 have been there over a year and have not missed a day since I have been there. I go to work at six and leave at five. During the noon hour, I take the dishes and wait on the three tables on the west side. I do not know Mossy Joy or Miller or Fitzpatrick. I know Mr. Greenberg. During the time I have been there, I never saw anyone go into any of the booths and take a roll of bills and count it, nor have I ever heard anyone in the saloon discuss Grand Dad Whiskey or discuss or talk about whiskey or getting a carload or any amount of whiskey, nor have I known of any whiskey to be sold in the place. It is pretty well crowded between one and two o'clock.

Cross-examination.

By Mr. Kelly:

I was on the premises when the government made a raid and arrested the proprietor last year. I did not see the government men as I was on the fifth floor. I did not see any whiskey or any packages or boxes. I heard no talk about whiskey. I have seen Mr. Heitler in there at different times. I have been down in the base-

ment and there is a stove and a table we cut meat on and some old pieces of chairs. Sometimes I see Mr. Greenberg in the saloon once a day and sometimes not at all, but I could not say how often, as I don't pay much attention to people in the saloon, except those in the settees that I wait on, and they might pay over the money and I might not see it.

Redirect examination.

By Mr. Symmes:

The table in the basement is a meat block.

EDWARD O'NEILL.

Direct examination.

By Mr. Symmes:

My name is Edward O'Neill. I live at 6835 South Halsted. I am a furniture and piano mover and am working for the De Vrees Express & Van Company. Last fall, I was connected with the Available Express & Van Company at 47th and St. Lawrence. I
339 just know Mr. Greenberg from moving him on the 29th of September and on the 30th. I receipted the bill, which is Defendant Greenberg's Exhibit No. 2 of March 1, 1921, and received the money on the 30th of September, 1920.

Whereupon Defendant Greenberg's Exhibit No. 2 was offered and received in evidence, said Exhibit being in words and figures as follows, towit:

340 DEFENDANT GREENBERG'S EXHIBIT NO. 2 OF MARCH 1, 1921.

Ship by Truck.	Available Express & Van Co. Furniture and piano.	Responsible, Reliable, Reasonable.

Movers, Packers, Shippers.

Fireproof Storage.

Furniture Bought, Sold, Repaired.

539 East 47th Street.

Phone, Drexel 562. No. 1997.

Chicago, Ill.,
Date, 9/30/20.

Name, Mr. Greenberg.
Address, 4737 St. Lawrence. Floor, 2.
Phone, ——. Piano, ——.

Deliver to 615 W. 26 St. Floor, ——.
Charge, ——.
Description, ——.
Driver, Hansen. Paid. Time left office, 3.05 P. M.
Helper, O'Neill. O'Neill. Arrived at job, ——.
Helper, 4 other men. Loaded, ——.
Per Hour, $9.25, $21.00. Start to unload, ——.
Mileage, ——. Time unloaded, ——.
Total, ——. Arrived office, ——.
Received in good order.
Terms cash. Driver not allowed to give credit. All claims must be made at the office within 48 hours.

(Signed) —— ——.

341 The evening of the 29th, I moved a piano, clock, victrola and suitcase over to the Lyons Hotel, 5020 Michigan Avenue. On the 30th, I took some barrels and two boxes and brought them down to 26th Street. I got them from Mr. Greenberg's flat, the second flat, 4737 St. Lawrence Avenue. I think the number to which I took them was 615 26th Street, but I do not know whose place it was. I was paid at 4737 St. Lawrence by Mrs. Greenberg. I did not see Mr. Greenberg there on the 30th. When I took out the things, between seven and eight o'clock on the evening of the 30th, some furniture was left in the apartment. Last Sunday evening someone from the government came and asked me if I hauled for Greenberg and if he was there and I told them just what I have told here.

Cross-examination.

By Mr. Glass:

The furniture left in the flat on the 30th was, I believe, a bedroom set and some dining room furniture. I did not see Mr. Greenberg at all. I saw him the 29th at the flat and at the Lyons Hotel about 7:30 P. M. when we moved the piano. We left one piece in the hallway and I think it was the piano. I did not do any hauling out of this flat except to the hotel and to 26th Street. On the 29th, I left Greenberg's after four o'clock. I went to the office and then went back to Greenberg's, got paid and then went to 26th Street.

Redirect examination.

By Mr. Symmes:

On September 29th, I met Mr. Greenberg about seven or seven thirty.

AMELIA RODKIN.

Direct examination.

By Mr. Symmes:

My name is Amelia Rodkin. I live on 31st Street, near Emerald Avenue. I am the sister of Mannie Greenberg and the mother of Benny Rodkin. Mr. Greenberg, in September, 1920, lived on St. Lawrence Avenue near 47th Street. I remember when he moved from there and I think it was on a Friday in October. I
342 saw my brother and my son on Friday at my home. I am an orthodox Jewess and I always light candles at sundown on Friday, which is the beginning of our Sabbath. I was just lighting my candles when I heard somebody knock. I called my little girl and told her to open the door because I was lighting the candles. She opened the door and my son and brother came in with a bag of sugar and a bushel basket of groceries. I could not talk to them right away because I had to say my prayer over the candles, which I did and then talked to them. They stayed just a little while. I wanted them to stay for dinner, but they said they couldn't. I think it was around five or a little after five.

Cross-examination.

By Mr. Kelly:

The first person who talked to me about this case was my brother, Mandel Greenberg, about a month ago. He asked me if I remember when he brought the groceries and I told him that it was the day he moved, that it was Friday and that I was lighting the candles as he came in. I also talked to Mr. Symmes about three weeks ago. When my brother saw me, he did not tell me that the day he moved was the day he brought the groceries, but I told him that. I know he was moving, because I talked to his wife and I talked to him and they told me that they were going to move. I do not know whether he moved on September 29th or 30th, but I know it was on a Friday. I had been over to his house and his wife told me she was going to move Friday. Mr. Greenberg never talked to me about the case until about a month ago, though I have seen him frequently. My son never talked to me about it.

JOHN FITZPATRICK.

Direct examination.

By Mr. Kirkland:

My name is John Fitzpatrick. I live at 7936 Maryland Avenue. I have been in the Police Department of the City of Chicago for thirteen years and an now a Sergeant of Police. In October,
343 1920, I was stationed at the Englewood Station, where I was

assigned as secretary to Captain Ryan. I write shorthand. I was there on Sunday, October 3rd, when Maurice Joy, Mickey Frank, Miller and Fitzpatrick were brought to the station and examined by Captain Ryan. I saw Nathaniel Perlman and Michael Heitler there. When Miller made his statement, Captain Ryan, Lieutenant Sullivan, Joy and myself were in the room. I heard Joy talking to Heitler and Perlman. He was swearing at them. Joy's language was profane. He said, you are a so and so; you are a double-crosser and was never anything else. He also said that he would get his money or whiskey back or he would jam him. He swore at Heitler as long as they were in each other's presence. Captain Ryan told him to stop abusing Heitler or he would be locked up. Heitler did not use any abusive language in replying to Joy. Joy told Heitler that if he did not get his money or his whiskey back "he was going to jam him", and he said "I have reached the station,—I have come here to the station, and I am going to go clear through with the whole affair. You had a chance to stop me, but you did not stop me before I got here. I am going clear through with it now." Heitler replied that Joy must be crazy and that he did not know what he was talking about. I was present when Mickey Frank and Heitler met in the Captain's room, which is about 10 x 14. Captain Ryan, Officers McCabe, O'Brien and Hart and, I believe, Lieutenant Sullivan, were present. Heitler was about four feet from Mickey Frank and I was about two feet from Heitler. I did not at that time hear Mr. Heitler say anything to Mickey Frank in Yiddish, nor did I hear any language spoken except English. I did not at that or any other time in that room see Mr. Heitler draw a finger across, or put his hand up to, his throat. Frank did not say anything to me or to any of the other officers in my presence about being afraid of Heitler. Mr. Heitler asked Frank if he had bought any whiskey from him and he replied that he had not. Captain Ryan then said to Frank "Didn't you just make this statement saying that you bought some whiskey from Heitler?" Frank replied, "No, I don't want to make any statement." He had
344 previously made a statement to Captain Ryan, but not in the presence of Mossy Joy, Miller or Heitler. I was in the room when Miller was making his statement and Joy was there also. When Miller was making his statement and answering the questions that were put to him, Joy interrupted and would answer in his place and did this so frequently that Lieutenant Sullivan told him that he had already made his statement and to keep still and let Miller make his or he would be put out of the room. Joy kept this up all through Miller's statement. Joy said that he had been held up by nine police officers and Captain Ryan told him to come to the statoin at the various roll calls and pick them out. I never saw him at a roll call or heard of his coming to one. Mr. Heitler did not make any written statement that night that I know of. I heard Mr. Heitler and Mr. Perlman deny knowing anything about this carload of whiskey.

Cross-examination.

By Mr. Glass:

I am Secretary to the Captain and do not have any beat to travel. While these interviews were taking place, I was taking them down in shorthand, but I could see what was going on at the same time. The first man I took a statement from was Fitzpatrick. The next man was Mickey Frank. The next was Joy, and the next was Miller. Heitler arrived after Frank. I did not notice Perlman particularly, but I saw him there. I do not think Perlman was in the room when Joy stated to Heitler that he had had a chance to stop him. When I took Joy's statement, Captain Ryan, Lieutenant Sullivan, Miller and myself were present. Miller was in the room all the time when I took Joy's statement. No statement was taken from Heitler. I did my typewriting in another room and if the men talked after I left, I did not hear all the conversation. When Heitler came in, Frank was sitting in the office at the Captain's desk. His statement was ready and Heitler was called in the room at the time. Frank was asked to sign the statement. I heard nothing about where the whiskey came from, except that it was gotten at 82nd and Vincennes, out of a Rock Island car.

345 Redirect examination.

By Mr. Kirkland:

The police officers whose names I have mentioned would be in and out of the room. I understood that Joy wanted Heitler to pay him some money or else give him some whiskey that had been stolen from him and which he thought Heitler had taken from him. Heitler said that he did not know anything about the affair. I do not know why a statement was not taken from Heitler, as I only act under orders.

EUGENE J. SULLIVAN.

Direct examination.

By Mr. Kirkland:

My name is Eugene J. Sullivan. I live at 4949 St. Lawrence Avenue. I am a lieutenant of Police and in October, 1920, was stationed at the Englewood Police Station under Captain Ryan. I do not remember the exact day when the statements were taken from Mickey Frank, Mossy Joy and Miller but I remember the occasion, as I was there. Captain Ryan and Fitzpatrick, who took the statements down in shorthand, were also present while Miller's statement was being taken. Joy acted very rough, used a great deal of profanity and most of his expressions were obscene. He said to Miller "You know those Jews have got our whiskey," and "Why don't you go ahead and talk?" He acted in such a manner that I reprimanded him and told him to be quiet and the Captain threat-

ened to lock him up unless he changed his demeanor and kept quiet. I talked with Mickey Frank that morning outside of the Captain's office and asked him about the liquor deal, and he said he knew nothing about it. I asked him why he made a statement and he said "I don't know why I made it; I know nothing about it." I think Miller was in a cell near him, but I do not know.

Cross-examination.

By Mr. Kelly:

I talked with Frank, Heitler, Miller and Fitzpatrick. I did not ask Heitler to make a statement. I was not in the room when Heitler and Frank met, nor when Frank refused to sign the
346 statement. I am not sure if I was there when Heitler came in. I went down to Frank's cell in order to get some more information and asked him if he had made a statement and why he denied now. He replied simply that he knew nothing about it and did not know why he had made it. I heard Captain Ryan asking Heitler about the statements made by the others and Heitler denied knowing anything about the charge.

LILLIAN GREENBERG.

Direct examination.

By Mr. Symmes:

My name is Lillian Greenberg. I live at 5020 Michigan Avenue, Lyons Hotel. Mandel Greenberg is my father. I am fourteen years old and go to Frances Willard School. In September, 1920, I lived at 4737 St. Lawrence Avenue. We moved from there to 5020 Michigan Avenue on Thursday night and Friday. We went from the house in a machine. The first night in the hotel my father did not come home until about nine o'clock. The whole family had the first meal together the night of the second day. My mother, my father, my smallest brother and myself were there and my big brother came in a little later, about seven thirty, when we were at the table. After dinner, I went to the show with my father, Mr. Stone and my cousin Ben Rodkin. I first saw them that night when they came upstairs. About eight thirty or a quarter of nine, I went to the show, at 51st and Calumet. After the show, I went to the fruit store on 51st near Indiana, where my father bought some fruit. Then we went home to the hotel and got there about half past ten or a quarter to eleven. My father went to bed and I stayed up awhile, talking with my brother.

Cross-examination.

By Mr. Glass:

My cousin and the moving men helped us move from St. Lawrence Avenue. I think I was home on Wednesday night and I think we

sent out a piano and some pieces of furniture to the hotel. I do not know if my father was there. I saw my father at seven thirty Thursday morning when he woke me up for school. I saw
347 my father Wednesday morning before I went to school, but I do not remember if I saw him when I returned at half past three or four o'clock. I went to the hotel to sleep on Thursday night, about eight thirty or a quarter of nine. My mother and my two brothers went with me. My father came to the hotel a little later, about nine o'clock. We did not have dinner at the hotel that night. I had my breakfast there the following morning and I think my father did. I do not remember seeing my father or Ben Rodkin on Friday afternoon, but on Friday evening Ben Rodkin came with Mr. Stone, about a quarter after eight, and we went to the show. I do not remember what picture we saw. We all came out of the show together and then my father and I went to the fruit stand and then went home.

JANET RODKIN.

Direct examination.

By Mr. Symmes:

My name is Janet Rodkin. I live at 724 West 31st Street and have lived there for about ten years. Mr. Greenberg is my uncle. Mrs. Rodkin who testified is my mother. Benny is my brother. I remember once when my brother and uncle came to my home and my brother carried in some sugar in a sack and my uncle carried in a bushel basket full of canned goods. In September, 1920, my uncle lived at 47th and St. Lawrence and moved from there about October 1st to 50th and Michigan. When they came to my home, I first saw them when I opened the door. My mother told me to open the door because she was lighting candles. This was on Friday. Mr. Greenberg told us he was moving that day. They came to the house between five and six in the afternoon, but did not stay very long.

LESTER GREENBERG.

Direct examination.

By Mr. Symmes:

My name is Lester Greenberg. I live at 5020 Michigan Avenue. I am the son of Mandel Greenberg. I am in the third year at Hyde Park High School and am on the foot ball squad. My father has an automobile which I drive, but he never drives it. We
348 moved to the hotel at eight thirty in the evening, the last of the month, and I took my mother, sister and brother over in the machine. I saw my father about nine thirty that night. The family had their first meal together at the hotel on Friday, which was the day after the night we moved in. I got there about

seven o'clock and the family was eating dinner. I had been at school at football practice. I finished dinner about seven thirty and went to my room. I did not go out that evening. My cousin Ben Rodkin and Mr. Stone called on my father and stayed a while and then they and my father and sister went to a show. I did not go, but stayed home to do my home work and because my mother was not feeling well. I was asleep when they came home.

Cross-examination.

By Mr. Kelly:

I do not go to school on Saturday, but I make it my business to do my home work the same night I get it. I do not remember the exact day when I moved from St. Lawrence Avenue, but I remember October 1st because my folks told me it was the last time I would live in a flat and I did not like to live in a hotel. I first knew I was going to be a witness about a month ago, when my father asked me if I remembered when we moved to the hotel and I told him yes. They started for the picture show about nine o'clock. I spoke to the lawyers twice about the case, the last time being about a week ago.

ISAAC BERNSTEIN.

Direct examination.

By Mr. Symmes:

My name is Ike Bernstein. I live at 4748 Ingleside Avenue. I am an athletic trainer and was connected with the Covenant Club of Chicago. I am now connected with Forbes & Leonard's gymnasium. I have known Mandel Greenberg for a number of years. He was a member of the Covenant Club and used to come to my gymnasium and take exercise. Sometime around October, 1920, I got the rowing machine out of his home at 47 something Champlain Avenue, and a pulling machine from some other place. I went upstairs to the house and it was practically empty. I
349 asked Greenberg where the rowing machine was and he said in the basement. We went down there and got the machine and I asked him where the pulling machine was. He told me it was across in the next block and we went back in the next block to where the colored family was and got the pulling machine.

Cross-examination.

By Mr. Glass:

I do not know the exact date.

Redirect examination.

By Mr. Symmes:

I never went at any other time than this to Mr. Greenberg' house.

GEORGE HANS, One of the Defendants Herein.

Direct examination.

By Mr. Symmes:

My name is George Hans. I live at 1945 Greenleaf Avenue. have been on the police force of the City of Chicago for ten year and am now and have been a detective sergeant for seven years I am a married man and have two children. I passed the bar ex amination in July and received a license (November 2, 1920) t practice as an attorney. I was born in Chicago and went to schoo until I was thirteen years old. From the time I was nine unti I was thirteen, I peddled papers and passed advertising bills fo different department stores. When I was thirteen, I went to wor for the Addressograph Company and worked there six months. I January, 1903, I went to work for the Postal Telegraph Compan and worked there until August, 1906, when I went with th Baltimore & Ohio Railroad, where I worked one year. Then worked *from* Bremner Brothers as credit clerk and then worked wit the Continental Tailors. I went on the police force March 4, 1911 I know Michael Heitler just by sight, not personally. I kno Nathaniel Perlman by sight. I do not know Mr. Greenberg. Prio to the indictment in this case, I just knew that Mr. Perlman ha a place of business the same as I know other places. I did not kno any of the defendants, except that I knew Simmons, Burns an Ambrosi between 1914 and 1917, when I was stationed in their dis trict but I had not seen or talked with them since I left tha
350 district. I never saw Sergeant Judge or Officer Galvin befor I saw them in court. I have seen Sgt. Smale five or si times perhaps, but cannot say that I have ever talked with hin On October 1, 1920, I was not, at any time of the day, at 63rd an State Street or in that neighborhood. I was not in Perlman's saloo at Wells and Washington on the night of October 1st, 1920, b tween eleven and twelve, nor did I go down on the South Side; no was I in Perlman's early in the morning of October 2nd, betwee one and two, nor did I then go with Mossy Joy, Miller, Perlma Greenberg, Heitler and other men to the South Side. I had neve seen Mossy Joy or John Miller before they took the witness stand i this case. I did not know Mickey Frank, Harry Frank, Joh Fitzpatrick or Greengaard until I met them about a month ag On September 30, 1920, I reported at six o'clock at the Summerdal Station, which is about nine miles north of the city. In Septembe I was working from 6 P. M. to 2 A. M. Commencing the 1st da of October my hours were changed to 8 A. M. to 6 P. M. O September 30th, about midnight, Sgt. Garrigan and I arreste William Cleveland at the corner of Lawrence and Broadway an sent him in the wagon to the police station. I got home about 4:1 or 4:30 A. M. in the morning of October 1st. On October 1st, reported for duty about 1 P. M. in the Summerdale Station, whe

was stationed. I was sleeping at home from 4:15 or 4:30 A. M. to leven o'clock on the morning of October 1st. It is about seventeen niles from Summerdale Station to 63rd and State. I stayed in the tation between one and two and then went to the West Side in the icinity of Kedzie and 12th, stopping in the City Hall at the City Comptroller's Office and then at the Treasurer's Office to get my pay. I got to the City Hall about five or ten minutes to three. Sgt. Garrigan was with me at the time. We travel in pairs in the detective bureau and Garrigan was my partner. When I made the arrest the night before, one man, Teddy Hayes, by name, got away and we went to Kedzie and 12th on police business, to look for him. We got there about a quarter of four or four. I saw Meyer or Milton Lintz, garage man at Albany and 12th. We stayed around there about an hour and then went back to the North Side. I did not report to the station that night. Sgt. Garrigan got off the car at Lawrence and Broadway and I got off at Greenleaf Avenue at 6:20 P. M. and went home. Later in the evening, my mother-in-law came to the house. I did not go out again that night. My home is about eleven miles from downtown. The first time I knew anything about this case or this carload of whiskey was when I read it in the newspapers, at which time my name was not mentioned. Mr. Kelly, of the District Attorney's Office, sent for me and I talked with him and Mr. Clyne and told them substantially the same story I have told here. Mr. Kelly told me to go home and think it over and to come back in a day or so. I came back and had another talk, and Mr. Clyne said I had better go before the Grand Jury. I testified before the Grand Jury for about half an hour or more and told them substantially what I have told here, insofar as I was questioned. I never had any business dealings of any kind with Michael Heitler or any of the other defendants in this case. I know nothing about any carload of whiskey or any whiskey of any kind coming to Chicago on the first day of October, 1920. I never acted as a bodyguard for Michael Heitler or for any other defendant in this case.

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Cross-examination.

By Mr. Glass:

I think I first saw Michael Heitler in 1914 when I was a detective sergeant at the Desplaines Street Station. Mr. Heitler used to frequent the cigar store in that neighborhood. I merely know Nathaniel Perlman by sight, not personally. I think I met Mr. Perlman sometime before May 1, 1920, when I was assigned to the detective bureau, which was about two or three blocks from his place. I have been in his place three or four times. I do not know Mr. Greenberg and I have never seen him in Mr. Perlman's place. I do not know O'Leary. I know Simmons. I may have met and spoken to Smale, in passing him upon the street. I went on duty a little after one on October 1st and went to the City Hall in the afternoon. The City Hall is about a block from Perlman's saloon. I

was not in Perlman's saloon that afternoon or any time tha
352 day. I do not know Mossy Joy or Miller. I went to th
City Hall for my check about five or ten minutes of three
just in time to get my money from the City Treasurer and the
went to the West Side and got there about four o'clock. Sgt
Garrigan went with me to the West Side. We were at Albany an
12th for about fifteen or twenty minutes and then went to the Circl
Theatre. We did not go back to the station that day and I got hom
about six thirty. I was not out of my house that night. I was no
on the South Side in an automobile looking for a carload of whiske
or a truckload of whiskey that had been stolen from Mossy Joy
I did not come back in the machine with Joy, Heitler, Perlman an
Greenberg, nor did I go to a garage on Sangamon Street early i
the morning or see there a man by the name of John Christie.

(Counsel for the United States here indicated as John Christie a man escorted into the courtroom by Mr. Walker, said man standin in front of the jury and facing the witness.)

I don't know where the Mid City Express Company garage is, no did I see John Christie at the garage of the Mid City Express Com pany at Sangamon and Van. Buren. Mossy Joy did not rap on th door nor did the garage man open the door, nor did I display my star and say "I am a police officer, it is all right," nor did they come i with the car and leave the car, nor did Christie, as the night watch man, have his gun and ask me and the other men what they wante and refuse to let them in until I showed my star and said I was a police officer, and I know nothing about any such occurrence. Th first time I knew about this whiskey robbery or deal was when I read it in the papers. I was not at Perlman's saloon on the nigh of October 1st, nor was I at the railroad cars at 83rd and Vincenne when the car was being unloaded nor was I with Mr. Heitler or Mr Perlman in order to guard them that night.

353 Redirect examination.

By Mr. Symmes:

The Comptroller's Office closes at three o'clock. I studied law i night school for four years. I went in Perlman's saloon at differen times when I was going to law school and would stop in for a sand wich or something on my way to or from the Northwestern Depo The Circle Theatre is at 12th and Sawyer. I saw there Fred Cleve land, an uncle of the boy we had arrested, and had a talk with him I was not at Sangamon and Jackson on October 1st or the morni of October 2nd. I have always carried my star in my pocket sinc I became a detective sergeant and have never worn it on my vest.

Recross-examination.

By Mr. Glass:

I did not show Mr. Christie my star in any way.

Mrs. Artheline Thiebadau.

Direct examination.

By Mr. Symmes:

My name is Artheline Thiebadau. I live at 7062 North Robey Street. I am the mother-in-law of George Hans and my home is about a quarter of a block from his. I remember being at Mr. Hans' home between a quarter of eight and eight o'clock in the evening on October 1st, 1920, because I went there to invite them to a party at my house which I was giving on October 2nd for my sister, who had come to visit me on Wednesday September 29th and who stayed just one week. Mr. and Mrs. Shipman, Mr. and Mrs. Fountain, my husband, my sister, Mr. Hans and his wife and his children and my children were at the party. When I went to Mr. Hans' house Friday night, Mr. and Mrs. Hans and their children were there. I left about a quarter of eleven. Mr. Hans was lying down where I came and shortly afterwards excused himself and went to bed. I am sure Mr. Hans went to bed because he could not have left the flat without my seeing him.

Cross-examination.

By Mr. Kelly:

The party was in my house on the 2nd of October. My
354 sister, Mr. and Mrs. Shipman and Ed Fountain and his wife were there. Mr. Shipman is my son-in-law. On the 1st of October, I talked to Mr. and Mrs. Hans at their home. I go to the Hans' a couple of times a week. I was there Thursday for a little while, but I said nothing about the party because I had not yet planned it. I was in there Friday afternoon. Two or three weeks ago, Mr. Hans asked me if I remembered what I had done on the 1st of October. Then I remembered the circumstances, and he said that that was what he wanted to know. My sister stayed at my house. On Thursday afternoon, I went to Hans' house about two o'clock and stayed there two or three hours. I talked to Mr. Symmes about the case.

Redirect examination.

By Mr. Symmes:

I knew that my son-in-law had been indicted, but I did not talk to him about the case because I did not want to hurt his feelings.

BEN RODKIN.

Direct examination.

By Mr. Symmes:

My name is Ben Rodkin. I live at 5221 Calumet Avenue. I am a nephew of Mandel Greenberg. In September, 1920, he lived three or four blocks from me on St. Lawrence Avenue, where he moved from October 1st. I met Mr. Greenberg on October 1st with my machine at the Hotel Lyons about eleven o'clock in the morning. We then drove to where he had lived at 4737 St. Lawrence and went into the house. Some people who had bought furniture from him came for it and we took some groceries and put them into the machine. Then Mr. Bernstein came about two thirty and we went downstairs and gave him a rowing machine. Mr. Berstein and Mr. Greenberg left for a short time and I stayed in the flat. Then Mr. Greenberg and I went to Mrs. Goldman's, on 26th Street, with some groceries and packages of linen and clothes which I had helped pack up and carry out into the machine. We stopped at Mrs. Goldman's just long enough to deliver a few things, the groceries and linen, and then went to my mother's at 31st and Emerald
355 and stayed there about twenty minutes. It was just getting dark and was about five o'clock. I saw my sisters and my mother there. We then stopped at 35th and State, at the Walgreen Drug & Chemical Company. Then we drove home. I had stopped at my house first before me went to Goldman's to leave some groceries Mr. Greenberg had given me. We got to the Hotel Lyons about six o'clock. I let Mr. Greenberg off and said that if he didn't have anything to do, we would go to a show that evening. After I had my dinner, I came down 51st Street and met Stone standing in front of Garber's and he asked me where I was going and I said I was going over to get Mr. Greenberg to go to a show. Mr. Stone and I went to the Hotel Lyons and asked the man at the switchboard, who I now know is Mr. Lyons, if Mr. Greenberg was in and then Mr. Greenberg came out of the dining room. I then went upstairs to Mr. Greenberg's room and saw Mrs. Greenberg, Lester, his oldest boy, and Lillian, his girl. We got to the hotel that night between seven thirty and eight o'clock and stayed there about half an hour, when Mr. Greenberg, Mr. Stone, Lillian and I went to the moving picture show at the New Park and stayed through the entire picture show. We left about eleven o'clock and we all came out together. I went directly home and did not go home with Mr. Greenberg or Mr. Stone.

Cross-examination.

By Mr. Glass:

About four or five weeks ago, Mr. Greenberg came to me and asked me if I remembered the date when we drove with the machine and distributed the goods, but I cannot remember the exact date. Then

I talked to the lawyer about a week or so ago, I don't remember exactly when. When I got to the hotel I went to the man sitting at the desk and asked for Mr. Greenberg. He called Mr. Greenberg in the lobby and Mr. Greenberg came from the dining room. Mr. Stone was right with me. I have an automobile which I keep at the South Park Garage. I don't remember the license number.

GERTRUDE HANS.

Direct examination.

By Mr. Symmes:

My name is Gertrude Hans. I am ten years old. I am in
356 the fourth grade at the Armstrong School and am the daughter of police officer Hans. I know my grandmother Mrs. Thiebadau and remember my aunt coming to visit from Michigan before Christmas. I went to my grandmother's to a party on Saturday night. We had a party at our house Sunday night. My grandmother came to our house after supper. My father was home when she was there. I went to bed a little later, after that. My grandmother was still there. My grandmother asked my mother and father if they would come to the party on Saturday night.

EMIL C. DEMMLER.

Direct examination.

By Mr. Kirkland:

My name is Emil C. Demmler. I live at 1925 Summerdale. I am a police operator at Rogers Park and was located at the Summerdale Station last September and October. Summerdale Station is eight or nine miles from City Hall. My duty was to take care of the officers' telephone calls and put them down on a record. I am familiar with the voices of the various police officers in the Summerdale Station last September and the 1st of October, 1920. Hans' Exhibit No. 2 is the daily record of attendance for the twenty-four hours ending eight o'clock in the morning of October 2nd and is in my handwriting. I have the record in front of me at the desk and make the entries at the same time I receive them over the telephone. From the record, it appears that George Hans and Garrigan were at the station on the 1st day of October, 1920, at 12.40 noon. I know Hans and Garrigan. They are marked as "on a case" on the afternoon of October 1st. Hans' Exhibit No. 4 is a police record in my handwriting telling what the officers were doing for the twenty-four hours ending October 1st at eight o'clock in the morning. The record for September 30th shows that Hans and Garrigan were at the station at 6.30 P. M. and telephoned in every hour until 10.46 P. M. Then they were marked "on a case" after 10.46. Hans Exhibit No. 3 is in my handwriting and shows what the police officers were doing from eight in the morning till six in the evening

of October 2nd. From the little "s" opposite their names,
357 I remember that I saw them at the station eight o'clock on the morning of October 2nd. The defendant Hans is the man whose name appears on these sheets.

Cross-examination.

By Mr. Glass:

Hans was marked on a case after 10:46, September 30th, and I have no record until the next morning at 12:40, when I saw him in the station and he was still marked on a case. I have no record of him for the balance of the day until eight o'clock of the morning of October 2nd.

Whereupon Hans' Exhibits Nos. 2, 3 and 4 were offered and received in evidence.

NICHOLAS AMBROSI, One of the Defendants Herein.

Direct examination.

By Mr. Borelli:

My name is Nicholas Ambrosi. I live at 3931 W. Congress Street. I will be fifty-three years old the 12th of next March. I am married and have two boys—twenty and twenty-three. One is working at the Fort Dearborn National Bank and the other goes to musical college. I was born in Italy and have been in this country since 1886, when I was sixteen or seventeen years old. I landed in New York in '97 and worked a couple of months on a railroad, then came to Chicago where I sold papers and shined shoes for a few months. My mother and father did not come with me. I came alone. I then worked as a porter in a saloon on Harrison and Halsted for a couple of months and then worked for Clute and Cregier at Van Buren and Halsted until about 1895. I became a citizen of the United States in 1892. In 1892, Creiger died and Clute took me into partnership. We also had a place at Van Buren and Green for five years and one on Van Buren and Sangamon. I have been in the saloon business since I came to Chicago. I was going home at one fifteen one morning and was waiting for a car at Van Buren and Racine when three men came up and one grabbed and choked me and the other two started to go through my pockets. I had a gun and I shot him. I was exonerated by the Coroner's inquest. I have had a saloon at the corner of Van Buren and Sangamon for twenty years,
the 2nd of last November. I know Mossy Joy and John
358 Miller. I met Michael Heitler about eleven or twelve years ago, but had not seen him since until I saw him in the court here. I have known Mr. Perlman about six or seven years. He used to sell me glassware. I do not know Edward Smale, but I know George Hans. He used to work at the Des Plaines Street Station. I do not know Morris Gindich, William Gorman, W. F. Knebelkamp, Timothy Judge, O. H. Wathen, Joseph Galvin, Frank Mc-

Cann, James O'Leary, Theodore McLaughlin, George Callaghan, John McGovern or Edward Graham, except as I have seen them in court here. I know George F. Quinn and know William J. Truedel by sight and have known Bryan Kane about six or seven years. I do not know Mandel Greenberg and never saw him in my life until I saw him in court. Before the 1st of October, I knew Maurice Joy by sight, but had never talked to him much and had not seen him for two or three years. I saw him on, I think it was, the 1st of October. Prior to that time I had not talked to him about whiskey. I have known John Miller about six or seven years. I was in Perlman's saloon on Wells and Washington Street- about a quarter after two in the afternoon of October 1st. I had been to the bank to get some money to cash checks on Friday for people around my place and stopped in the saloon to go to the toilet. I bought a cigar and a glass of near-beer. John Robinson was with me. I was standing at the bar in the saloon and the first thing I knew Miller tapped me on the shoulder and said "Hello, Nick, just in time. We have got some whiskey that we want to sell and I take it you want some." I replied that I did not want any, that I had not used any since the dry law. He then showed me a paper with a long list of names on it and said that a lot of people on the West Side and North Side were getting it. I said that I might take a bottle or two, but he replied that they were only selling 50-case or 100-case lots. I stood there five or ten minutes smoking and he gave me two telephone numbers and said that I could call him up in case I changed my mind or needed any. Miller said one of the numbers was his house and the other place was some place downtown, which I have forgotten. I then went away. I at no time gave Mossy Joy or
359 John Miller or Mr. Perlman $2,780 to buy whiskey for me.
I did not have any conversation with Joy, but was talking to Miller. I did not see Mr. Heitler there and did not talk to him about buying any whiskey. The next day, I had been to the City Hall to see Alderman Powers about some references to get a job for a fellow. He is the alderman in my district. After leaving the City Hall, I stopped in Perlman's. Miller and Joy were drunk and I asked what the matter was and they replied that I would holler too if I had lost my watch, diamonds, a whole lot of whiskey and money. I told them that if I knew the person, I would tell him to fetch it back or otherwise I would fix him. Miller said to me "You are a pretty lucky man; we lost everything." I stayed there about five or six minutes. I did not go in with a gun and say to Heitler, Perlman, Joy and Miller that if they did not give me my money back I would shoot everyone of them. Miller did not give me any money back because I had not given him any. I did not on the 1st of October, or or any other day, talk to anyone about getting any whiskey for me. I know nothing about any conspiracy to get any whiskey from Louisville, Kentucky. I remember the time I went to the District Attorney's Office, but I do not know the day. I did not see a lawyer before I went because I did not think I needed one. The first time I knew about this affair was Sunday morning, com-

ing out of church with my family. I bought a paper and my name was there in the paper. An officer came for me and we went to the District Attorney's Office and saw Mr. Kelly and Mr. Walker and talked to them and I told them I didn't buy any whiskey and didn't know anything about it. I told them I did not know Mr. Heitler, but that I did know Mr. Perlman and had bought a lot of glassware from him. I told him substantially what I have told here this morning. I did not give Mr. Joy, Mr. Miller, Mr. Perlman or anyone else any money at all on October 1st for whiskey. Mr. Miller did not give me a receipt for any money, nor did I get a receipt from Mr. Heitler or anyone else for any money.

360 Cross-examination.

By Mr. Glass:

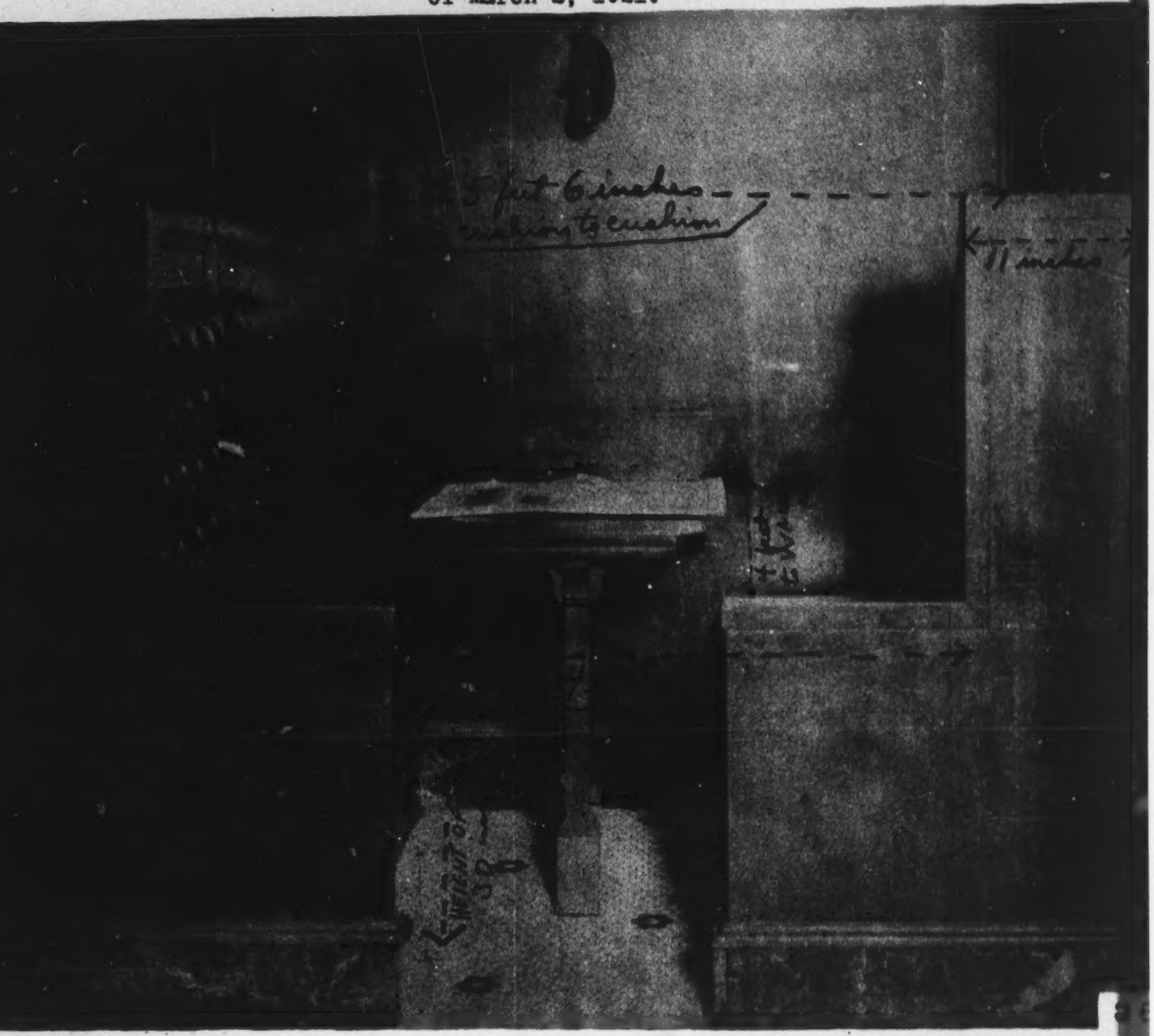
On Friday I went to the Merchants Trust & Savings Bank on Clinton and Jackson, about a mile west of Perlman's place, to get money to cash checks. A friend of mine named Robinson wanted to go to the City Hall and I offered to take him in the machine as I was going downtown and it would only take a few minutes to go to the City Hall. So I went to the bank and got $800, took him to the City Hall and waited in the machine until he came out again and then drove to Perlman's saloon. Then Robinson and I went to the toilet in Perlman's coming out I got a cigar. I do not know who was in there, but the place was crowded. I think I saw Joy there and I saw Miller there and Mr. Perlman was tending bar. Miller touched me on the shoulder and asked me if I had any whiskey and said "If you want to get some, we have got some to sell now, we have got a lot of whiskey." Joy was talking to somebody on the other side and had his back turned to us. Perlman was behind the bar. I did not see Greenberg there. I know Heitler, but I did not see him there. I did not look around and do not know whether or not Heitler was there. I did not pay much attention, but Miller said the price was $130 or $132, something like that. He said they were not selling less than a 50 or a 100-case lot. I fix the day as Friday because I had to cash checks on that day and on Saturday, between four and five in the afternoon on Friday and between eleven and one on Saturday. I did not get the money for cashing the checks before October 1st. I drew $800 out of the bank to cash checks and up to the time I went into Perlman's, I knew nothing about whiskey and nobody had talked to me about it. Joy heard some of my conversation with Miller and said to look at the names of those who had gotten it and that I had better get it. I did not arrange to buy any whiskey that day nor did I call up the telephone numbers. After I left Perlman's saloon, I went right to my place of business with Mr. Robinson. While I was talking to Miller, Robinson was at the sandwich counter right behind us. I do not remember talking to anyone else that day. The place was so crowded you couldn't turn around and everyone was talking, but I did not pay any at-
361 tention to what they were talking about. I do not know Harry Frank. I have seen O'Leary, but have never met him.

Defendent Perlman's Exhibit 1
of March 2, 1921.

Defendent Perlman's Exhibit 2
of March 2, 1921.

Defendent Perlman's Exhibit 3
of March 2, 1921.

Defendent Perlman's Exhibit 4
of March 8, 1921.



I could not tell whether or not he was there that day. I was only there seven or eight minutes.

(Whereupon the witness was withdrawn for the time being.)

RICHARD MILLER.

Direct examination.

By Mr. Symmes:

My name is Richard Miller. I live at 1854 North Halsted Street. I am a photographer and have been for seventeen or eighteen years. I took some photographs last night under your direction. Defendant Perlman's Exhibit No. 1 of March 2, 1921, is a photograph taken by me last night in a saloon on the southwest corner of Washington and Wells Street. It shows the view that can be seen from behind the lunch counter looking toward the settees in the saloon. When this picture was taken, my camera was behind the lunch counter and beside the cash register. Defendant Perlman Exhibit No. 2 of March 2, 1921, was taken under the same circumstances as Exhibit No. 1. The camera was right in the center of the horseshoe shaped counter. The lunch counter would be at the left side of the picture if it were extended. Defendant Perlman's Exhibit No. 3 of March 2, 1921, shows one of the booths from the edge of the counter. Defendant Perlman's Exhibit No. 4 of March 2, 1921, is exactly the same as Exhibit No. 3. The figures appearing on Exhibit No. 4 are the measurements taken by me last night and those measurements are correct. Whereupon defendant Perlman's Exhibits Nos. 1, 2, 3 and 4 of March 2, 1921, were offered and received in evidence, the same being in words and figures as follows, to wit:

(Here follow defendant Perlman's Exhibits Nos. 1, 2, 3, and 4 of March 2, 1921, marked pages 362, 363, 364, and 365.)

366 NICHOLAS AMBROSI (Resumed).

Further cross-examination.

By Mr. Glass:

I left three or four minutes after Miller gave me the telephone numbers. I had been to the bank first and then went to the City Hall with John Robinson and then went to Perlman's. This must have been about two o'clock or two-fifteen. The bank closes at two o'clock and I must have been there about five or ten minutes before two. I never called up Joy or Miller at either of the number. On Saturday, the next day, I went to Alderman Powers' office and then went back to get the car on Wells Street and went in Perlman's to get a cigar. On Saturday Miller and Joy was drunk, standing on the bar, arguing, there was a lot of people there. They was arguing, they had lost their watch, their diamond, a carload of whiskey and everything else. He was talking to everybody. I said, "What are you raving about?" There were a lot of people there that day, but I do not remember anyone else. Perlman was behind the bar. I did not see Greenberg and O'Leary there. I did not see Quinn there, but he might have been there without my knowing it. I did not see George Hans there and I do not think he was there. I have not seen him for two or three years. On the second day, I was there about eight or ten minutes. I did not talk about losing this whiskey to Perlman, Miller, Joy or Heitler. I had been in Perlman's saloon a month or so prior to October 1st. I do not remember what business took me downtown the time I was in Perlman's saloon about a month before October 1st. I did not give Miller $2,780 in currency in front of Perlman, Greenberg, Heitler, and Joy. I did not get my money back because I did not have any coming. I did not give the money to Heitler. I did not give it to Perlman or anybody.

Q. Weren't you a little bit afraid of turning the money over without having some paper or some security?

A. I did not give anybody money, unless I have a lawyer transaction for me.

367 After I left Perlman's Saturday afternoon, I went back to my place and stayed there until about one o'clock in the morning. On Saturday, I first went to the bank and then took Mr. Robinson to the City Hall and went to see Alderman Powers. Then I went back on Washington Street to wait for the car. The car was not coming, so I went to Perlman's place about a quarter after two in the afternoon and then went home. On Saturday the place was crowded; people were standing at the lunch counter and around the bar and the settees were full. I talked about whiskey with Joy and Miller and the rest of them and asked what they were raving about. He said "You'd rave too if you lost your diamonds, your money and load of whiskey. What would you do?" and I said "If I know who

did, I make them fetch it back, otherwise I fix them." They said I was pretty lucky because I did not buy any whiskey from them. I had been to the bank in the morning about nine-thirty and then went to see Alderman Powers and then went to Perlman's. When I was at the District Attorneys' Office, I was asked if I had been in that saloon that day. I said that I was and have always admitted that I was.

Cross-examination.

By Mr. Kirkland:

When I was in Perlman's saloon on Friday I did not have an appointment to go there. The Defendant Perlman was tending bar at that time. I did not hear Perlman say anything to Miller on Friday. The bar was crowded and he was pretty busy, working all alone. Perlman never spoke to me on Friday. I did not see Heitler on Friday and do not think I saw Greenberg. Neither Heitler, Perlman nor Greenberg said anything to me on Friday or at any other time about buying whiskey from them. While Miller and Joy were talking to me, Perlman was busy tending bar and took no part in the conversation. On Saturday, to get back to my place of business, I take a Taylor Street or Wells Street car and transfer on Van Buren. I could get either one of those cars at Wells and Washington. On Saturday, I did not see either Heitler or Greenberg in Perlman's saloon. Perlman did not say anything to me on Saturday. Neither Miller nor Joy mentioned the name of either
368 Perlman, Heitler or Greenberg to me on either Friday or Saturday that I know of. Joy had the list of names on a piece of paper about eighteen inches long. I did not look at it.

JOHN J. ROBINSON.

Direct examination.

By Mr. Borelli:

My name is John J. Robinson. I live at 414 South Sangamon Street and have lived there about seven or eight years. I have known Nick Ambrosi about twenty-seven years. The only time I was in Perlman's saloon was on October 1st. I had met Ambrosi that day about nine o'clock in the morning. He was going to the bank. I was going to the City Hall and said I would go along with him as I thought he was going all the way down. He stopped at the bank. I was going to excuse myself as I did not want him to go downtown out of his way, but he said "I might as well take you down. I have got nothing to do." We left the bank about five or ten minutes to two and drove to the City Hall. I went to see James Connors, the City Hall janitor, but he was not in and we then went to the saloon at Wells and Washington Street. We went to the toilet and then back to the bar and had a glass of near-beer, a sandwich

and a cigar. We stayed there about ten minutes, not over fifteen minutes. I saw two men come up to speak to Ambrosi, but I was eating my sandwich and did not pay any attention to what they were taking about. I was close to them and I did not see Nick Ambrosi count out a large denomination of bills to give to these men, nor did I ese him give any money to Mr. Perlman. I did not see any money being given to either of these two men or Mr. Perlman. Then we went back to the west side to Mr. Ambrosi's saloon.

Cross-examination.

By Mr. Kelly:

I first knew I was going to be a witness a week or two ago. I have talked with Mr. Ambrosi and Mr. Borelli, and we talked about the case in Nick's saloon. I have been to the bank with Nick several times and when I have nothing to do in the way of painting and decorating, I sometimes take a ride with him. I remember
369 October 1st because of going to see the janitor at the City Hall. I did not see anybody in the saloon that I had known before. I do not know Mossy Joy, John Miller, Heitler, or Perlman. That was the first time I had been in the saloon and we went in at my suggestion. We left Ambrosi's saloon together and came downtown. I went to the bank with him, but I do not know how much money he drew out. I never went to the bank for him and do no know how much money he gets when he goes. We left Ambrosi's saloon right after lunch, about a quarter of two, and went to the Merchants Loan & Trust Bank in Mr. Ambrosi's machine. Then we went downtown and parked the machine and walked to the City Hall and on the way back we stopped in the saloon. Ambrosi was with me when I went to the City Hall, about two o'clock. We got to Perlman's saloon about two thirty. Several people talked to him, but I did not pay much attention and do not recall any of the conversation. I was about two feet from Ambrosi. I believe I saw a man show a paper to Ambrosi about the size of a card. They were talking something about whiskey, but I do not know exactly what was said, except that outside Mr. Ambrosi said "Them guys want to sell me some whiskey. I do not want any." There were about ten people in the saloon. Mr. Ambrosi did not tell me why he drew the money out of the bank. Several people were standing in front of the lunch counter eating sandwiches. I did not notice any settees in the place. I am in Nick Ambrosi's saloon every evening, I live in the same building. I never help Nick cash any checks, but I have helped him sometimes when he was adding them up in the morning. Sometimes the amount would be a couple of thousand, but I do not remember it being as much as $4,000. I did not see Nick get the money from the bank, as I sat outside in the machine.

PETER P. SNELLING.

Direct examination.

By Mr. Symmes:

My name is Peter P. Snelling. I live at 629 Beldon Avenue. I am Assistant Paymaster of the City of Chicago. I have
370 been connected with the City of Chicago for fifteen years. I do not know George Hans, but he is on the payroll as a police officer of the City of Chicago. Police officers are paid on the 1st and the 16th of the month. The checks are first sent at eight o'clock in the morning by the paymasters to the different stations. Defendant Hans' Exhibit No. 5 is a check, payable to George Hans. It was paid October 1, 1920, by the City Treasurer of the City of Chicago between 9 A. M. and 3 P. M.

Whereupon Defendant's Hans' Exhibit No. 5 was offered and received in evidence.

Defendant Hans' Exhibit No. 6 is a check payable to John J. Garrigan and is practically the same as the Hans check, except for the name and the number of the check. It was also paid by Teller Fardy on October 1st at the City Treasurer's window, second floor of the City Hall.

GEORGE HANS (Recalled).

Direct examination.

By Mr. Symmes:

My name appears on the back of the check which is Defendant's Exhibit No. 5. I signed my name at about five or ten minutes of three on October 1st on the second floor of the City Hall. The number of my star is 611.

MEYER LINTZ.

Direct examination.

By Mr. Symmes:

My name is Meyer Lintz. I live at 3405 W. Roosevelt Road. I am an automobile dealer. Roosevelt Road used to be 12th Street. I have known George Hans about two years. In September we had a place of business at the above address and also two other places. George Hans is not related to me. I sold out the business on Roosevelt Road on November 1st. About three or four weeks before I sold the place, I saw Sgt. Hans late in the afternoon at 3016 W. Roosevelt Road together with another police officer by the name of Harrigan or Garrigan. He asked me if I knew a fellow by the

name of Billy Cleveland and I said yes. There was some talk about
another man by the name of Hayes or Haas. I believe Hans
371 stayed in my place about fifteen or twenty minutes. This
was between three-thirty and five or five-thirty. I do not know the exact date, but it was three or four weeks before I sold the place.

WILLIAM P. SINNOTT.

Direct examination.

By Mr. Symmes:

My name is William P. Sinnott. I live at 5062 Winthrop Avenue. I am a Sergeant of police stationed at the Summerdale Station. I have been a police officer almost twenty-eight years. Sergeants Hans and Garrigan are in that station. I am the desk sergeant. The detectives make their reports to me. Sgt. Hans made a report to me on October 1st, 1920. This report is in my handwriting. I got this report from the files in the Summerdale Station and it is now in the same condition as when I placed it on file. Sgt. Hans made the report to me at two o'clock on the afternoon of October 1st, 1920. He told me about arresting a man named Cleveland, who had a gun on him, several hours previous and that his partner got away and they wanted a message sent out describing the man they had locked up and the man Hayes, who had escaped. The address of Hayes was 1236 South Kedzie Avenue, which is near 12th Street. It would be their duty to report to me when they left the precinct and they said they were going to the west side.

Cross-examination.

By Mr. Glass:

My attention was first called to the fact that I was going to be a witness in the early part of last week. All that I have testified to has occurred to me by reason of the record from the files.

Redirect examination.

By Mr. Symmes:

After looking at that memorandum, my recollection is refreshed as to what I had testified to and this was a correct memorandum made by me in the regular course of business.

372 Recross-examination.

By Mr. Glass:

I am unable to tell whether Hans or Garrigan made the report. When these reports are sent out for men wanted, they are signed by the desk sergeant in the captain's name. The police officer making

the arrest makes the report. One of them would make the report, but the report would not be made by both of them.

Whereupon Defendant Hans' Exhibit No. — was offered and received in evidence, being the report aforesaid.

WILLIAM W. WOOD.

Direct examination.

My Mr. Kirkland:

My name is William W. Wood. I live at 3859 Lincoln Avenue. I am and have been a police officer of the City of Chicago for twenty-two years and am now and have been at the Summerdale Station for eighteen years. In last October and September, I was lock-up keeper there and kept a record of the men locked up. Defendant Hans' Exhibit No. 8 is a page from the arrest book and the line beginning with the word- "William Cleveland" across the two pages, with the exception of the disposition, the word "wagon," is in my handwriting. I got the information I put down from the arrest slip. On Friday, October 1st, 1920, I came on duty at eight o'clock in the morning and got the arrest slip from the arrest sergeant's desk.

The Court: Yes, let that fact appear without anything further. The record that Cleveland was locked up at 12:40 A. M. October 1st, 1920.

JOHN J. GARRIGAN.

Direct examination.

By Mr. Symmes:

My name is John J. Garrigan. I live at 4744 Malden Street. I am a detective sergeant of the police department of the City of Chicago and have been for about eight years. I have been a police officer in the City of Chicago for thirty-four years. In Sep-
373 tember and October, 1920, I was stationed at Summerdale. I know George Hans and travel with him as a partner. Sgt. Hans and I had been working nights, but changed to days in October. On September 30th, about a quarter of twelve, midnight, Hans and I stopped some men at Lawrence and Broadway whose looks we did not like. I arrested a boy by the name of Cleveland. The other man got away. I interviewed Cleveland as to the other man and found out his name was Teddy Hayes. I locked up Cleveland because he had a revolver on him. After sending this man to the station, I notified the wagon man that we were going over around 12th and Kedzie to try and get this man Hayes and if we stayed over there any length of time, we would not report before twelve o'clock the next day. We went over around 12th and Kedzie to look for the boy, but did not find him. I got home about 4:30 A. M. I next saw Sgt. Hans at one oclock on October 1st at the Summerdale

Station when I reported for duty. We talked to the Cleveland boy and tried to get a better description of Hayes. We then went to the desk sergeant and Hans wrote out a description of Hayes and gave it to the desk sergeant to be sent out to the different stations. We then say Captain Woods and told him about the arrest and he said to go ahead and look for Hayes. We then rode down to the City Hall to get our money. We did not get paid at the station because the paymaster comes around about a quarter of twelve and if you are not there, you can't get your money, but have to go to the City Hall for it. We arrived at the City Hall about twenty minutes of three. Hans and I went and got our checks and then went to the City Treasurer on the second floor and got them cashed, then we took the car to Kedzie Avenue and 12th Street. We went to the States Garage and some men there told us that an uncle of Cleveland's ran the Circle Theatre, so we went one block west to the Circle Theatre where we had a talk with Mr. Cleveland, the uncle. We finally gave the search — and took the car home. We left 12th Street and Kedzie about ten or twelve minutes of five and I got off at Lawrence and Broadway about six or a few minutes after,
374 and went home. I did not go out again that night, nor did I see Hans again that night. I saw Hans the next morning in the Summerdale Station.

Cross-examination.

By Mr. Glass:

Hans and I have been detective sergeant partners since last May. After leaving Hans on the Broadway car, I did not see him again until eight o'clock the following morning. I was first talked to about testifying in this case last Sunday. I have fixed the date by reason of the arrest we made that evening. I knew when Hans was indicted and, of course, we talked about it. When you asked the question before I thought you meant when had I talked about it lately. I do not know where Hans was after I left him on the car.

JOSEPH GALVIN.

Direct examination.

By Mr. Kirkland:

My name is Joseph Galvin. I live at 1244 West 96th Place. I am a police officer and have been on the force fifteen years. I was a defendant in this case up to last Friday, when I was dismissed by the court. On the night of Friday, October 1st, my beat was from 83rd to 87th and from State to Vincennes, in the southwest part of the city. I was traveling out of Gresham Police Station and that was my first night on that beat. Sgt. Judge was my superior officer at that station at that time. That night I pulled the box at eight o'clock at 87th and Vincennes and walked north. Near Lowe Avenue, I saw a truck that had no light on and questioned the driver.

e said he was waiting to get a load of stuff out of the freight yard. could see the lights burning in the office and I went to where a g truck had backed up against a car. I thought it was a robbery d got out my gun. About fifty feet from the car, I asked if there ere any Rock Island representatives there and three or four men me over to me and one of them said "You know me, Galvin, don't ou?" and I recognized him. There were four of them, Wissing, Hara, a fellow I know by the name of Tom (I found out later his st name was Lynch) and another fellow I only know as Fred.

75 I knew they were police officers for the Rock Island Railroad. I said "I thought there was a robbery here" and they said no, that they were moving some perishable goods. I ent to the car, but I could not see what they were doing, except at they were moving boxes, as there was only one lantern inside e car. I then turned away and just as I did so, Sgt. Judge and ree or four other patrolmen, all in uniform, came from the Gresm Station. He came to me and said, "Galvin, what is going on re" and I said "Nothing," that there were three or four Rock land men that I knew and he asked me what I thought it was and said "It looks like a carload of booze", so he walked up and looked the car, and I started walking toward the street. Sgt. Judge and e other fellows stood there a minute or two and then came after e out to the street. Nobody was around the car except the four ock Island men and two or three men a little south of the car. e truck against the car, and another one on the street, were all at I saw. There was an automobile along side of Lowe Avenue d another one a little farther north. The first time I ever saw ichael Heitler was in the Englewood Station, I think the 4th of tober, after I had been to the car. I did not see him at the r that night, or at any one of the trucks or automobiles, or around e vicinity of 83rd and Vincennes. The first time I ever saw the fendant Perlman was in this courtroom. I did not see him at is car, or near the car, or near one of the trucks or automobiles. e first time I saw the defendant Greenberg was in this courtroom. did not see him at the car or near the car, or near the automobiles trucks that night. I did not see any of the defendants at the car at night. I went to the office of the District Attorney about the ird of November and told him substantially what I have told re. After that I was indicted in this case.

Cross-examination.

By Mr. Kelly:

Mr. Kirkland first asked me to be a witness the other day, after I was discharged from the case. I had been in Mr. Kirkland's

6 office to make a statement after I had been in the Federal Building and I told him the same story that I told to the ief of Police and that I told to you. He asked if I had a lawyer d I said I had a wife and five children and did not have money ough, so he said that he would help me out as he could handle just as well as one. Anyone could get a statement from me in

regard to this case, as I have nothing to conceal. There was no light around the car that night, except one lamp which was pretty dim. I did not tell you (Mr. Kelly) in the Federal Building that anyone represented himself to me that night as Sgt. Karvacke. I did not see Mr. Heitler there. The only two trucks I saw were one at Lowe Avenue and the other against the car. I have talked to no one, except Mr. Kirkland, about being a witness. I have been to Mr. Kirkland's office twice since I was dismissed from the case.

Redirect examination.

By Mr. Kirkland:

Mr. Kelly had a stenographer present *with* I made the statement to him. I was in Mr. Kelly's office twice. He asked me if I knew Mr. Heitler and I told him I never knew or saw the man until I saw him in Englewoood Court. I was at the car at about 8:15 P. M. The two or three men I saw south of the car were about a car length from me. I did not investigate because I saw it was not a robbery and, as the railroad men were there, I thought they would be responsible.

HENRY P. WISSING.

Direct examination.

By Mr. Symmes:

My name is Henry P. Wissing. I live at 453 East 74th Street and am a Lieutenant of Police of the Chicago, Rock Island & Pacific Railroad, with which I have been connected for about ten years. I was indicted and was a defendant in this case, but was dismissed the first day of the trial. My attorneys are Messrs. Taylor & Schwartz, the attorneys for the Chicago, Rock Island & Pacific Railroad. On October 1st, 1920, after attending a trial in the
377 Criminal Court as a witness for the railroad with my captain, Mr. Gathen, I returned to the office about one o'clock. A railroad man who belongs to the railroad special police department is always assigned as a guard to every car which leaves Peoria, whether it contains a carload lot or only one box of whiskey. I first heard of this carload of whiskey the night of September 30th or the morning of October 1st, when we got a wire. About three o'clock in the afternoon of October 1st I received orders from my superior officer and went to Gresham Station at 87th and Vincennes Road. I left on the 3:40 train and arrived there 4:05 railroad time or 5:05 city time. Just before I reached Gresham Station, I noticed the switch engine pull the car from Gresham freight house to the team track. When I got off the train, I walked toward the car and asked the yard master where they were going with the car and he said they were going to take it to Gresham yards, between 94th and 95th Streets. I rode with the car from between 83rd and 84th Streets to the Gresham yards because of my orders from S. R. Gathen, my commanding officer. I remained with the car at Gres-

ham freight yards until shortly after six o'clock. I then went to the team track, where the car was unloaded that evening. I was there all the time the car was being unloaded, taking the automobile license numbers of the trucks which hauled away the contents of the car. I did not see any permit. When the car arrived at the Gresham team track, I went in the freight station and asked the agent for the teamster's memorandum, or fourth copy of the expense bill, which is used to show the automobile license numbers when anything is hauled away from the freight house or team track. Koeller, the agent, had thrown it in the waste basket and went over and got it. While he was looking for it, I turned to the man who was standing with Mr. Turner and asked him if he was the consignee of the car and he said yes. When the agent handed me the teamster's memorandum I saw the name "Max Berkson, Gresham, Illinois". I asked him if he was Max Berkson and he said yes. The defendant Gindich is not Max Berkson. When they went to open the car, I accompanied the agent and Lieut. O'Hara.

378 They got a bar and opened the door. The agent went inside the car first and Max Berkson after him. That was the last I saw of Max Berkson. I do not know Michael Heitler. I did not see the gentleman who is standing (indicating the defendant Heitler) at the car that evening. I do not know Mr. Perlman. I did not see the gentleman who is standing (indicating the defendant Perlman) at the car that night. I do not know Mr. Greenberg. I did not see the gentleman who is standing (indicating the defendant Greenberg) at the car that night or anywhere else around the station. I was with the car when it came to the team track and stayed with it until it was unloaded. The first time I ever saw Mr. Heitler was when I was in Mr. Dalrymple's office after making a statement to the prohibition forces. Mr. Callahan, the Prohibition agent, questioned me and I made a statement of facts practically the same, insofar as I was questioned, as I have made here. Mr. Callahan told me to come back the next day to sign the statement, which I did. He then said the statement was not ready, but to come the next day about nine o'clock in the morning. At that time Mr. Callahan asked me if I knew Mr. Heitler and I said no and he said that he was going to be there and that he wanted me to get a look at him to see whether or not he was one of the men who was at the car that night. Then Mr. Heitler came in and Mr. Callahan pointed him out and I said that that was the first time I had ever seen him. No one brought in Mr. Perlman or Mr. Greenberg. Mr. Heitler was the only man that was ever pointed out to me.

Cross-examination.

By Mr. Glass:

The man on the car guarding it when I got there was James O'Donnell. He had been with the car from the time it arrived at the Burr Oak yards, where he had taken it from either Heil or Lincoln, I do not know which. I telephoned Mr. Gathen from the freight house, told him the car was at the team track and was going

to be unloaded and he told me to get the automobile license numbers
on the trucks. I was in the office about five minutes, but
379 I did not see any permits or other papers signed. I did not
see Mr. Gorman, I was not there all the time that Koeller, Berkson and Turner were there, but just came in, got the teamster's memorandum and left. I did not see Gorman at the car. At the time Koeller, Berkson, O'Hara and myself opened the car, it was on the team track. Sgt. Lynch and Patrolman Park, Rock Island Officers, were also there. No trucks were at the car, but one truck stood a short way from the south end of the car on the team track and moved up shortly after the car was opened. I could not see whether or not anyone besides the driver was on the first truck. No automobiles was standing on the team track, but I believe one automobile was standing on the street. I did not see anybody get out of the automobile and go to where the car was being unloaded. I did not see any men standing around where the trucks were being loaded with the whiskey. I did not see Mr. Gorman or Sgt. Judge at the car, but I did see Patrolman Galvin. It took about three hours to unload the car. I took all the automobile license numbers, but Mr. Koeller also took some. After taking the number, I would ask him how many cases went on the load. I turned the numbers in to Mr. Gathen next morning. I did not give any of the teamsters that hauled the trucks that night any expense memoranda. I did not see anybody around the car except the police officers I have mentioned and the drivers of the trucks. I was there when the last truck left. I did not hear anyone come back and complain or talk about trucks being robbed. I do not know how long the automobile remained, but I do not think it was there when I left. I think some men were standing on Vincennes Road, off the team track, when I left, but I did not go down there. I left before Koeller did. I met the agent at the car after the car was unloaded and the last truck had gone and we checked back our numbers. I do not know Sgt. Judge and only knew Patrolman Galvin, whom I have known since I was a boy. I did not talk to him that night. I did not talk to anybody except Koeller and the Rock Island men. When I left, I saw some men standing on Vincennes Road. I believe I saw one automobile standing in the entrance of the team track off Vincennes and an-
380 other standing across the street, but did not see anyone in
them. When the trucks were loaded, I did not hear anyone say "Mickey Frank, 105 cases" nor "Mossy Joy, 140 cases," nor did I hear anything said about how many cases were going on any truck. I did not hear any policemen come up and talk to Koeller. I was present all the time, either on one side of the car or on the other. I did not see any whiskey distributed from the cases. I could not tell how many people were at the car aside from police officers, railroad detectives, Mr. Koeller and the truck drivers, because the trucks, except one, were covered trucks and I could not see inside. I could hear voices in the car talking, but could not see who was inside. I am sure that I did not see Mr. Gorman at the car that night and I am sure I did not see any police officer talk to Koeller, nor did I see any whiskey distributed.

Redirect examination.

By Mr. Symmes:

When the trucks backed up, I would be first on one side then on the other, and when on one side I could not see what was happening on the other side. Some people might have come up on the other side of the truck, or something might have happened there, and I could not have seen it.

Cross-examination.

By Mr. Houlihan:

I do not remember seeing Mr. Gorman at the freight station, just before I went to the car. I was not in the station when the identification was made. I first saw Mr. Berkson in the office. I remember seeing Mr. Gorman there that night after the car was unloaded. I did not see him when he got in the machine with Mr. Turner and went home, as I had left the office.

FRANK O'HARA.

Direct examination.

By Mr. Symmes:

My name is Frank O'Hara. I live at 5616 Champlain Avenue. I am now and have been for five years a special officer for the Rock Island Railroad. On October 1st, 1920, I was sent to Gresham Station in line of duty by Mr. Gathen. On arriving there, I first went to the freight station and met Mr. Turner and the agent. Mr.
381 Turner said there was a carload of whiskey to be unloaded. I then called up the boss and said every thing would be all right as Mr. Turner was there and he replied that Mr. Turner would see that the proper papers and credentials were there. I then went out in the yard to look for the car, about 7:20 or 7:30 P. M., and was there when the car came. I helped the agent open the door with a bar and remained with the car until it was unloaded. I saw the man who was supposed to own the car, Max Berkson. The man inside the car, Berkson, was calling a fellow by the name of Mossy. One day last week, Mr. Lynch and I were standing out in the hallway when this man came along and Mr. Lynch recognized him as the man who had been standing by the car. I found out afterwards his name was Mossy Joy. I had seen him at the car, standing between the truck and the front of the car, and it seemed to me that he was checking the goods. I now know Mr. Heitler, but did not see him at the car that night. I never before in my life saw this gentleman (indicating the defendant Greenberg), nor did I see him at the car that night. I did not see this gentleman (indicating the defendant Perlman) at the car that night. I did not hear anyone

that night come back and say they had been held up. I was indicted in this case and was represented by Mr. Taylor of the Rock Island Railroad. I first saw Mr. Heitler a couple of years ago, but was never acquainted with him. I first saw him after October 1st in Major Dalrymple's office, in the prohibition office. I was shown Mr. Heitler and told Mr. Callahan that he was not the man I had seen at the car.

Cross-examination.

By Mr. Glass:

I think eight or ten trucks was there that evening, but I do not know positively. I did not see anyone in the car besides Berkson and the railroad agent. Mr. Lynch, Mr. Wissing, the agent Koeller and Berkson were with me when the car was opened at 7.45 or 7.50 or near 8 P. M. Mr. Koeller went after a bar to open the door of the car as it was spiked. I did not see anyone except those whom I have mentioned. I did not see any trucks there when we
382 opened the car, but some came about five or ten minutes afterwards. I did not see anyone leave and tell anyone else that the car was open. I do not know who was on the first truck, but I think there were two men on the seat. I did not talk to them. One man got off the side of the truck, but did not go into the car. I heard Berkson, from the inside of the car, call him Mossy. I am pretty sure this was the first load and I think the number of cases was 150, but I am not quite sure about that. Berkson said "All right Mossy," but Mossy did not say anything back. He had a piece of paper and pencil in his hand and, it seemed to me, was checking this stuff. I did not see Mossy leave with the truck. The second truck pulled up right away, but Mossy was not there when th second truck came. The driver was on the second truck. I did not hear anything said about how many cases were to go on that truck. Wissing was on the other side of the truck and Lynch was with me. While the second truck was being loaded, I was standing at the south end of the car, about thirty-five feet away. I went back and forth everywhere about the car, even in back of it, to see that everything was all right. I stayed at the south end of the car a few minutes and then walked into the team track. There were a lot of people around, about thirty-five or forty, but I did not see Joy. I saw some police officers and talked to Officer Galvin. I did not see any automobiles there. Officer Galvin asked one of the boys, I do not remember which one, what was happening and then said he thought it was all right with us railroad men there. The men who were there were moving about back and forth from the street to where the car stood. I did not see any of them come up to the car, but they might have, as I was not at the car all the time. I don't remember how many men were on the second truck when it left. The third truck pulled in immediately. I did not see any automobiles on the street except Mr. Turner's car. He took it away about twenty or twenty-five minutes after I first saw him in the

freight office. During the rest of the evening I did not see
383 any automobiles. I was standing at the end of the third truck when it backed into the car. I did not hear anything said about how many cases were to go on it, as I didn't pay any attention after the first one. Joy was standing in the same place, between the door and the car, but I did not hear him say anything, nor was anyone with him. I saw Joy with Berkson that evening, when the car was first opened, but with nobody else. The second time I saw Joy, he also had a paper, but I did not hear him state any amount. I could not say how men were on the third truck when it drove off. Joy did not ride up on the truck or get off of it. The agent, Koeller, had a lantern and was in the car. I did not see Berksen get out of the car until it was unloaded. I did not see Joy inside the car. I was close to the open door of the car every time a truck backed in, but I cannot say I saw anyone in there besides Berkson and Koeller, though there might have been. I can't say how many cases went on the third truck, because I didn't pay any attention. I was standing there when the fourth truck came up. Joy walked out to the street when the third truck was loaded and I did not see him there at the fourth truck. He did not say anything when he went away, nor did I see anybody go with him. I do not know how many cases went on the fourth truck as I paid no attention after the first truck. I did not see anyone marking or with any paper at the fourth truck. The paper which I saw was about the size of a sheet of letter paper. Joy was checking on this paper on the first and third truckloads. I did not see him at the second truck. He was around the team track afterwards, but I did not see him checking. I didn't pay any attention to names on the trucks, as Mr. Wissing was there for that purpose, nor did I talk to any of the drivers. Most of the crowd of men were present when the fourth truck was there. I did not hear any names mentioned other than Mossy and I did not hear the name Bob mentioned. I cannot say how many men were on the fifth truck. I was there when the sixth, seventh, eighth, ninth and tenth trucks came in and were loaded, but I could not see that anyone else got in or out of the car. After the tenth truck was
384 loaded and had left, all the men had gone except Mr. Lynch and myself. I cannot exactly say whether or not Joy was still there when the last truck was loaded. I do not know how many cases were loaded on the last truck. I did not see anybody come up and talk around the last truck while it was being loaded. The crowd of men were around while the tenth truck was being loaded, but after it was loaded, they went away. Nobody, except the driver, got on the tenth truck and went off. I remained on the team track and could not see whether or not the men went away in automobiles. Mr. Lynch and I were the last to leave. I did not see any Grand Dad Whiskey there that night, but was told the cases contained it. I did not see any cases opened or see any bottles, nor did I get any whiskey, nor see anyone get it. I do not know William Gorman. I did not see anyone come up to Mr. Koeller when he was standing in the car and have a conversation with him. I know Sgt. Judge,

but did not see him at the car. I saw him at the entrance of the driveway into the team track, about twenty or thirty minutes after the car was opened, talking to Officer Galvin. I know Sgt. Kalasky, but did not see him there that night, nor did anyone mention his name in my presence. Sgt. Judge did not talk to me and I did not hear him come up and ask Koeller if he had a permit. After the car was unloaded, I did not hear anybody come back and complain about being robbed. If there had been any loud talking close to the car, I would have heard it. I first knew I was going to be a witness in this case when I was subpœnaed, two or three days ago. I have talked with Mr. Symmes, but not with any of the other attorneys for the defendants.

Redirect examination.

By Mr. Symmes:

I talked to Mr. Kelly in the Federal Building when he called me there and I made a statement to him. I was right around the car all the time and never got farther away than thirty or forty feet, or maybe twenty yards. The people who were around the car were moving about and might be coming and going. The defendant Gindich is not Max Bergson.

385 D. H. HAGALBARGER.

Direct examination.

By Mr. Houlihan:

My name is D. H. Hagalbarger. I live in Peoria, Illinois, and am and have been train master for the Rock Island Railroad for twelve years. I have known William Gorman since May, 1917, when he enlisted in my company to go to France. He was with me until we returned in April, 1919. Since that time I have not kept track of him. I know the reputation of William A. Gorman for the two years he was in France with me for truth and veracity and as a law abiding citizen and that reputation is good.

JOSEPH GARDNER.

Direct examination.

By Mr. Houlihan:

My name is Joseph Gardner. I live at 1421 East 60th Street, Chicago. I am traffic manager for the United States Cast Iron Pipe Company. I have known William Gorman all his life. I know his reputation in the neighborhood where he resides, among his associates in the city of Chicago, for truth and veracity and as a law abiding citizen and that reputation is good. Basing my opinion

upon my knowledge of his reputation, I would believe him under oath.

Cross-examination.

By Mr. Glass:

I know where Mr. Gorman lives and could find the house, but I do not know the number. I cannot say how long he has lived there, but I think about fourteen years. I know nobody else in the neighborhood except his family and have not talked to anyone in the neighborhood about Mr. Gorman.

Redirect examination.

By Mr. Houlihan:

I have never heard anything to Mr. Gorman's discredit.

386 THOMAS LYNCH.

Direct examination.

By Mr. Symmes:

My name is Thomas Lynch. I live at 3017 Parnell Avenue. I have been a sergeant of police for the Rock Island Railroad, but resigned on the 3rd of January last. I know Frank O'Hara. I know Michael Heitler from seeing his picture in the paper and seeing him passing in a machine. On October 1st, 1920, I was sent to Gresham Yards by Captain Gathen. I got to the Gresham Yards, between 93rd and 94th Streets, about ten minutes to six in the afternoon. I had been instructed to protect the car. At that time, Mr. Wissing and a man by the name of Donald were there. I stayed with the car until it was unloaded. The car was moved about six thirty and I rode on the car to the Gresham team track. They began to unload it about seven thirty and I stayed with it until it was unloaded, about ten thirty. I did not see Michael Heitler at the car. (The defendant Perlman arose and faced the witness). I do not know Mr. Perlman, nor did I see him at the car. I did not see this gentleman (indicating the defendant Greenberg) out there at the car. I never knew Mossy Joy. At the car that night, I heard the name Mossy addressed to a man standing at the south side of the car. I saw this man the other day coming through the hallway to the courtroom. Mr. O'Hara and I were standing outside and recognized him as the man we had seen at the Gresham team track, alongside of the car. I found out that his name was Mossy Joy. That night, he had a paper and pencil, but I couldn't say whether he was checking cases or checking names. I did not hear, at any time while the car was being unloaded, anyone there who claimed that they had been held up.

387 Cross-examination.

By Mr. Kelly:

I saw Lieut. O'Hara at the car when the car got to the team track, about seven thirty. He remained until the car was unloaded. I know Mr. Kelly and Mr. Glass. I spoke to Mr. Kelly in his office and made the same statement I made here. I do not remember the date of the statement, but I made it before I saw anyone connected with the defense in this case. I did not tell Mr. Kelly anything about Mossy Joy as I was not asked about it. O'Hara and I were standing in the hallway and as this man passed by, we recognized him as the man we had seen at the car that night. Mr. Symmes then told us that his name was Mossy Joy. Lieut. O'Hara was around the car all the time, on the north, south, east or west side. He did not leave the car that I know of, nor did I. I saw two men in the car, the agent and another man whom I heard called Max. I never saw Mossy Joy inside of the car, but saw him on the south side of the truck, alongside of the car. He appeared shortly after seven, about seven thirty, during the commencement of the unloading. I believe it was the first, second or third truck. My attention was attracted to Mossy Joy because he had pencil and a slip of paper, doing some checking, and I thought he was one of our own men and went over to take a look at him. He was not, so I did not pay any more attention. So far as I can judge, he was there until the fourth or fifth truck was loaded. I did not pay any attention to when he went away, but after a while I did not see him around. The first officer I saw was Officer Galvin, who asked me what was going on and I told him everything was all right, that we were Rock Island officers and he went over to the car, took a look and then went away. I saw him later in the evening, out on the street after the car was unloaded. I know Sgt. Judge and saw him there that evening. He came with two or three other officers and went to the car door, looked around and went away again. He spoke to somebody, but I do not know who it was. Lieut. O'Hara was around the car somewhere, but I do not know exactly where. I did not see Judge after he went away. At this time, Mr. Wissing was
388 standing by the truck taking the automobile numbers. There was a bunch of people about the car, but it was dark and I couldn't see the faces of all of them.

Redirect examination.

By Mr. Symmes:

This gentleman (indicating the defendant Heitler), I have known by sight for about ten years, but I did not see him about the car.

Recross-examination.

By Mr. Kelly:

If Mr. Heitler had been around the car, I would have known him and I do not think he could have been there without my seeing him.

FRANK MCCANN, One of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

My name is Frank McCann. I live at 873 North La Salle Street. I am fifty-four years old. I am one of the defendants. I am now working as a cigar salesman. I was formerly employed as a cigar salesman in Righeimer's saloon on Clark Street, but left there last March. I have known Mossy Joy about five years and John Miller about ten years. Miller was a bartender before the country went dry and was saloon manager for Righeimer, at Van Buren and Clark. I was in Perlman's saloon on Saturday, the 2nd of October, with Mr. Truedel and Mr. Quinn, about one or one thirty. I did not have any appointments with anyone, nor did I go there because I had any commissions or was interested in any liquor at all, but I went in there to get a sandwich. There were quite a few people in there. I saw Joy and Miller there, but did not speak to them. This was the first time I had met Joy and Miller on Saturday, October 2nd. I was in the saloon about ten minutes, eating a sandwich. Quinn, Truedel and I were together and none of us spoke to Joy or Miller. Joy and Miller were having an awful argument about something; all I could hear was whiskey, money and diamonds, and stuff like that. I didn't pay much attention to it and do not know with whom they were arguing. Mr. Perlman was tending bar. I have known him two or three years, from seeing him come into Righeimer's, but was not intimately acquainted with him,
389 nor have I had any business dealings with him of any kind.

I knew Mr. Heitler by sight before this case, but I did not see him in Perlman's saloon when I was in there Saturday. I did not know Mr. Greenberg before this trial and did not see him Saturday in the saloon when I was there. When I was in the saloon on Saturday, I did not walk to where Joy or Miller were. I did not say anything about commissions I had coming to me. Joy did not say to me to keep out of this and not to butt in and let him get his $20,000 or $18,000 and he would give me five or six hundred. I did not have any commission coming from anybody. When I left the saloon on Saturday, I went to the Elks' Club, which is on Washington Street about one hundred fifty feet east of Wells, on the opposite side of the street from Perlman's, which is on the southwest corner of Wells and Washington. I am not an Elk, but went there with two members, Mr. Truedel and Mr. Quinn. We were in there until about four or five o'clock. Joy and Miller came to the Elks' Club shortly after we did and came into what is called the Taproom, where Quinn, Truedel, a few other people and I were. They sat down at a table and were talking and arguing in a very loud tone of voice about whiskey and about being held up. I was sitting at another table talking to members of the Elks. After a while, I got up and went to the bar in the next room to get a cigar. Then Joy and Truedel came in and stood at the other end of the bar talking.

I was not quite fifteen feet from them and heard them talking, but didn't distinguish any words. I heard a slap and looked around and Truedel was on the floor and Joy was standing as though he had just struck Truedel. Then Joy came over to me, using some profane language, and said "You too, McCann. I will punch you in the nose the same as I did before, and your friend Quinn too, if he was here." He had punched me in the nose before. Then he turned around. Miller had just picked Truedel up off the floor and then Miller took hold of Joy and took him out. They were both drunk. While I was at the Elks Club and after I had left Perlman's, I did not see anyone come in, speak to Joy and
390 then Joy leave the place with him. I did not go back to Perlman's again that afternoon, nor did I again see Joy in Perlman's saloon that afternoon, nor was I at any time "butting in" any argument Joy was having with Perlman, Heitler or Greenberg, nor did I see him have any argument with Perlman, Heitler or Greenberg. When Joy left the Elk's Club, that was the last I saw of him that day. I was not interested in the carload of Grand-Dad which has been talked about here, nor did I make any arrangements with anybody to bring it to Chicago, nor had I made any arrangements with anybody to sell any part of it, nor had I sold any part of it to anybody about the 1st of October, nor did I have any arrangement or agreement with Heitler, Perlman or Greenberg, or anybody else, as to commissions. The first time I knew anything about it was when I read it in the paper Sunday. I am intimately acquainted with Truedel and Quinn, but with none of the other defendants. I did not know Kane, Nick Ambrosi or Ed Callaghan. I know Simmons by sight and O'Leary by reputation, but had never had any business dealings with him. I did not know Sgts. Judge, Hans or Smale or Officer Galvin or the distillers that were here from Louisville.

Cross-examination.

By Mr. Glass:

I have been selling cigars since last July. Prior to that time, I worked as a cigar stand attendant for Mr. Righeimer and then for Mr. Hardy. I always worked at the cigar counter and in no other capacity. I am now working for the Sir Clifton Company, 744 North Clark Street, Chicago, on a salary and commission basis and was working for them on October 2nd, 1920. I used to go in Perlman's saloon occasionally, but was not in the habit of going in there and do not think I have been there more than a dozen times in my life. I am not positive that I was not in there before May 1, 1920, but I do not know who owned the saloon before May 1, 1920. On October 2nd, I think it was about one or one thirty when I went into the saloon. I had been on the north side and was coming down Washington Street and met Quinn and Truedel coming out of the Elk's Club. I had not been in the Elk's Club with Quinn
391 and Truedel up to that time on that day. I might have been in there Friday, but I do not remember. When I got to the

saloon, quite a few people were there, but I did not take any particular notice of who they were. I knew Mr. Heitler at that time, but only by sight. I did not distinguish the conversation of Joy, beyond the fact that it was about whiskey, diamonds and money, as I was on the other side of the bar, about the length of the jury box from where he was. We were at one end of the bar and Joy was at the other end. I could not say who was doing the talking of the six or seven around Joy, as I did not want to get close to them to find out anything. I never want to be near Joy when he is drinking. I saw John Miller there and he may have been talking. Quinn and Truedel were with me. Either I or one of them, I have forgotten which, said that we better get out of there, it was no place for us. I did not hear anything about trucks loaded with whiskey being stolen and I paid no particular attention to the argument, as I was in a hurry to get out. I did not hear anything about the holdup. I do not know who was in the group Joy was addressing, aside from Miller, as I did not pay particular attention to them. After being in the saloon about ten minutes, we went to the Elk's Club. Joy and Miller came in a short times afterwards. I do not know Caruso. At the Elk's Club, Joy was sitting at a table with Miller and some other men talking about the same thing. I could not say whether or not any of the men sitting at the table were any of the men I had seen in Perlman's saloon. I heard them talking and arguing, but I was not listening or paying any attention.
392 The argument was getting heated and I went to one end of the bar and was there just a few minutes when Joy came in with Truedel. Joy was talking pretty loud. I didn't pay any attention to what was being said. I was at the other end of the bar from Joy and Truedel and was not right with them. I heard them talking but did not pay any attention to it. I looked around when I heard the slap. I left Quinn and Truedel in the Taproom, moving about and talking to various people. Mossy Joy did not tell me or Quinn or Truedel to get away and that was not the reason I went into the Taproom. Aside from Joy, Miller, Quinn and Truedel, I did not know any of the men in the Taproom. I did not hear the name Grand-Dad Whiskey mentioned in Perlman's saloon. I know John Fitzpatrick slightly, but I did not sell him the whiskey he got in this deal. I only know O'Leary by hearing about him. I am not an Elk. The Taproom and the bar are not a public places but are part of the Elk's Club. I was a guest of Mr. Truedel. Mr. Heitler and Mr. Greenberg could have been in the crowd in the saloon Saturday and if they had been sitting in one of the settees, I would not have seen them.

Redirect examination.

By Mr. Kirkland:

I do not pretend to say whether or not certain people were in Perlman's saloon that afternoon. I never went by the name of Joe Reilly. Before the first and second of October, I knew John Miller very well, as I had worked with him when he was manager of

Righeimer's at Van Buren and Clark; I worked there at the cigar stand.

393 Q. Where were you working in February and the latter part of January, 1920? That would be a year ago last January.

A. For Righeimer.

Mr. Glass: I object to that as immaterial and not redirect.

Mr. Kirkland: I say it is not redirect. I put it on the ground that it is something I overlooked.

Q. Did you ever have a talk with Johnny Miller in the latter part part of January or early part of February, 1920, about a carload of Grand Dad?

A. Yes.

Q. What was that talk?

Mr. Glass: I object to that, if the Court please, as not——

The Court: Sustained.

To which ruling of the Court the defendants, and each of them, by their counsel, then and there duly excepted.

Mr. Kirkland:

Q. Well, did Miller tell you——

Mr. Kirkland: I call the Court's attention to the fact that I put there impeaching questions to Miller.

The Court: They were immaterial and allowed because no objection was given. The question is as to another transaction.

Mr. Kirkland: I submit that the question of whether or not Miller and Joy, or either one of them alone, were dealing in liquor has an important bearing upon the question in this case—upon the question of whether they are telling the truth or whether the defendants are telling the truth; whether this carload of whiskey was theirs, or whether it was Heitler, Perlman and Greenberg's.

Mr. Glass: I object, if the Court please, as not material.

394 Mr. Kirkland:

Q. Did Miller tell you in Righeimer's saloon, in the latter part of January or early part of February, 1920——

Mr. Glass: I object to the question, including what the statement was. He can ask if there was any conversation.

The Court: He is just making a record now.

Mr. Glass: I would like to have a proper question.

The Court: Well, let the question be put, and you can make your objection afterwards. I will tell the witness now not to answer.

Mr. Kirkland: Don't answer until the Court rules.

Q. Did Mr. Miller tell you in the latter part of January or early part of February, 1920, in Righeimer's saloon, that he had this wholesale business——

Mr. Glass: If the Court please, I object to the question being put that way, because he is going to get a statement here before the jury and a lot of stuff, and they can ask whether there was a conversation, and then I can object to it, and that will be sufficient.

The Court: The counsel have the right to put the question to make the record. I will rule on the matter, and counsel has the right to make his record. Proceed with the question.

Mr. Kirkland:

Q. Did Miller tell you in Righeimer's saloon in the latter part of January or early part of February, 1920, that he had a carload of Grand Dad and that he had disposed of it?

The Court: Any objection?

Mr. Glass: Yes, I object to that, if the Court please.

The Court: I did not understand that you objected.

Mr. Glass: I did not understand that he was through with the question.

The Court: The objection is sustained.

395 Mr. Kirkland: Exception.

To which ruling of the Court the defendants, and each of them, by their counsel, then and there duly excepted.

Mr. Kirkland: May I ask the Court, would that be your Honor's ruling upon any effort on our part to show other liquor dealings that Joy and Miller have been in since the Prohibition Act and previous to the 1st of October, 1920?

The Court: Yes.

Mr. Kirkland: So that it will not be necessary for us to produce such testimony.

The Court: Yes, that will be my ruling. You do not need to produce any more, and let the record show that you have made that offer.

To which ruling of the Court in sustaining the objection to the said offer of proof the defendants, and each of them, by their respective counsel, then and there duly excepted.

I knew several members of the Elk's Club around October 2nd, 1920, but was not a regular attendant.

Whereupon, the defendants, by their respective counsel, renewed the offer heretofore made (815) to show a variance between the allegations of the indictment and the proof adduced in support thereof, that is to say, the defendants offered as witnesses the said Maurice John Joy and a Grand Juror to prove that the said Joy had testified before the Grand Jury and, in his said testimony, had given to the said Grand Jury his own name and the names of the witnesses Miller, Morris Frank, Harry Frank, John E. Fitzpatrick and Greengaard; had told to the said Grand Jury his own

396 connection with the alleged conspiracy; had told to the said Grand Jury the connection of the said witnesses with the al-

leged conspiracy; that the said Grand Jury knew the names of the said Joy and the said witnesses, the alleged unknown conspirators, and that the names of the said alleged co-conspirators were known and not unknown to the Grand Jurors.

The Court: I think that the offer that you now make without any calling of the witnesses, is sufficient and I will announce that I will exclude such testimony. It would be merely to prove the alleged variance between the indictment and the testimony of the witnesses who testified, let us assume, that others were in the conspiracy than those named in the indictment.

To which ruling of the court the defendants, and each of them, by their respective counsel, then and there duly excepted.

NATHANIEL PERLMAN, One of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

My name is Nathaniel Perlman. I am the proprietor of the place at Wells and Washington. I am thirty-four years old and am single. My mother is living, but my father is not. I went to public grammar school, but not to high school. I started to work when fourteen, helping my father who was in the bottler's supply business. Later on, my father and I went into the glassware business and for twelve or fifteen years I sold glassware to saloon keepers and restaurant keepers in the city of Chicago and so became acquainted with many saloon keepers and restaurant keepers. I quit selling glassware about a year ago. About two years ago, I went into partnership in the saloon at Washington and Fifth Avenue, but was still in the glassware business. My partners were James J. Kennedy and Mannie Greenberg. We did business under the name of Perlman & Kennedy. Greenberg was at that time a salesman for a brewery and did not give any active time to the business. Kennedy withdrew last April and Greenberg withdrew last May, since which
397 time I have been the sole proprietor. Heitler never had a cent of interest in the saloon since I have been there. The saloon is on the southwest corner and these photographs are photographs of parts of my saloon. One entrance is right on the southwest corner of Washington and Wells. Entering through this door, you come up to the front of the bar. The settees are on the west side of the room. The lunch counter is on the Washington Street, or north side. On the Wells Street or east side, there is a circular bar. There is also an entrance on the Wells Street side and the stairway going down into the basement is directly in front of this entrance. In September and October, there was a kitchen and some meat blocks in the basement, but no card tables or booths. There was also an ice box there. I have known Michael Heitler about nine or ten months. I met him at Hot Springs for the *the* first time and had never had any business dealings with him before that. I saw

him to speak to at Hot Spriugs four or five times. From the time when I returned to Chicago up to the 1st of October, I saw him two or three or four times a week, generally around lunch hour. Once in a while, in the evening, he came in to play cards. I have never been to his house nor has he ever been to mine. I have known Greenberg since he was a boy, but had never been in business with him before he and I opened this saloon. I used to sell him glassware when he was in the saloon business. While I have had the saloon, I have bought our supplies from the company Greenberg is with. After the 1st of May, when he withdrew, Greenberg used to drop in regularly, but at no set time. From ten in the morning until six in the evening, the saloon is a pretty busy place. We serve plate lunches and sandwiches. After six o'clock, we do not serve any hot lunch, but only sandwiches. About five or six hun-
398 dred people come in there every day, except Sundays. I rent out the concession for selling food. When the concessionaire leaves, about seven o'clock, he leaves 100 or 150 sandwiches made up to be sold by me. The busiest time of the day is about a quarter of eleven, when there will be twenty or fifty people in there, I generally get down about a quarter of eleven and stay until closing time. On October 1st, there were working in the saloon the lunch man, the cigar man, the porter, the sandwich girl, the bar tender and myself. I do not know everybody who comes into the saloon. Some people come in every day of the year, but I do not know their names. I have heard the testimony of Joy, Miller, Fitzpatrick, Greengaard and the two Franks. I did not have anything to do with bringing a carload of Grand-Dad liquor from Hobbs or Louisville, Kentucky, to Chicago in the latter part of September or the early part of October, last year; nor did I have anything to do with selling any part of a carload of Grand-Dad liquor that came from Louisville, Kentucky, around the 1st of October, 1920; nor did I collect any money from anybody to buy any part of that liquor or for any of that liquor which has been testified about here; nor did I agree with or talk with or conspire with or make any arrangement with Heitler, Greenberg or any of the thirty defendants who were here at the start of this case, to have a carload of Grand-Dad brought here between the 20th of September and the 1st of October, 1920. I do not know Berkson. I did not have anything to do with sending one or two men to Louisville, or to Hobbs, to purchase liquor between the 20th of September and the 1st of October, nor did I arrange with any of the defendants or anyone else not named as a defendant to buy, between the 20th of September and the 1st of October, this liquor from Hobbs or Louisville, Kentucky. The first time I ever saw Messrs. Wathen and Knebelcamp, the distillers, was at this trial. I did not, either alone or with the defendants or with anybody else, arrange to send a man named Berkson to Peoria, Illinois, to have a car re-
399 consigned from Peoria to Chicago. I have never met a man who goes by the name of Berkson. The first time I saw the defendant Gindich was in this courtroom. I did not make any deal with him about liquor. I did not make any arrangement with any of the defendants who were here at the start of the trial or who are

here now or with anybody else not named as a defendant, to arrange for the unloading of a carload of liquor on the afternoon or evening of October 1st, at 83rd and Vincennes or any other place in Chicago, nor did I send out any agents, or anybody acting on my behalf or acting on behalf of the other defendants or anybody else, to sell any part of the carload of liquor that was received here in Chicago on the 1st day of October, 1920. I never met the defendant O'Leary until I met him in the courtroom. I never sold him any glassware. I met McCann in Righeimer's. I am an Elk. I know Truedel. I have never had any liquor dealings with McCann at any time. I never had any liquor dealings with the defendant Truedel since the country went dry. I have known the defendant Quinn since I was a boy and sold him glassware. Since the country went dry, I have never had any liquor dealings with Quinn. I have known Mr. Ambrosi about five or six years. I never met Sgt. Smale or Sgt. Hans before the indictment in this case. I do not know Sgt. Judge or Officer Galvin and never met either of them before I came to court, nor have I ever had any liquor dealings with any of them or paid any one of them any money to handle any carload of liquor for me or any part of a carload or to help unload it. I never saw McCaffrey, who was a defendant at the start of the case. I only know Simmons from seeing him here. I have known Kane for a good many years and became acquainted with him by selling him glassware. I do not know William Gorman and the first time I ever saw him was in this courtroom. I know Mr. John McGovern by selling glassware to his brother. I never had any business dealings with John McGovern. I have known Mossy Joy since boyhood. In the five years prior to the month of September, 1920, I have only
400 seen Mossy Joy eight or ten times, and had not seen him since he got out of the saloon business. I met John Miller for the first time in the latter part of September, 1920, in my saloon. I know Harry Frank and Mickey Frank through selling them glassware. I had not seen Harry Frank or Mickey Frank from the time I quit selling glassware to October 1st, 1920. I did not know Louis Greengaard before he came to court. I know a man named Moore. I do not know Caruso. I never asked Moore to go out and sell any liquor for me. I was not with Heitler in Mickey Frank's saloon about the middle or on the 22nd or 23rd of September, 1920, nor did I at that time and place ask Mickey Frank if he was in the market for some whiskey or liquor. I have not been in Frank's saloon since I got out of the glassware business, nor did I at any time in the month of September, 1920, tell Mickey Frank or Harry Frank or Louis Greengaard that they could have liquor for $125 or $130 or $132.50 a case. I did not, on the afternoon or evening of Thursday, September 30th or the morning of Friday, October 1st, telephone Mickey Frank or Harry Frank or Louis Greengaard and tell them to send the money over, that the car was in, or words to that effect. I do not know a man named Kiser. I did not sell any liquor to Greengaard or take any money from him for liquor, nor did I take any money from Harry Frank for liquor, nor did I take any money from Harry Frank that Mickey Frank had sent to me

for liquor. Harry Frank and Louis Greengaard did not come to my place about eleven o'clock Friday morning, October 1st, or any other time, and pay me a large sum of money, about $13,000, for any part of a carload of Grand-Dad Whiskey or for any other whiskey. I do not remember seeing Harry Frank or Louis Greengaard in my saloon about eleven o'clock or a little after on the morning of October 1st, but they might have been there as so many different people come in every day that I can not tell who does come in. I have known the witness Fitzpatrick a good many years. I used to sell him
401 glassware when he was out in the stockyards. I have never been in his present place of business, but I knew he had a saloon. He has never, to my knowledge, been in my place of business at Wells and Washington. I did not, on the morning of October 1st, or any other morning since I have had the saloon, go into the basement with Fitzpatrick and a man named Riley and two or three others, nor did I go into the basement with Fitzpatrick alone or with Riley alone and take from a table in the basement $18,000 or any other sum of money. Between ten thirty and two thirty anyone can come in the side door on the Wells Street side and walk down into the basement without my noticing them. The Wells Street door is a regular entrance and is open during business hours. While tending bar I might be facing north, northeast, west or southwest and unless I happened to be facing south, I would not see anyone walking down the stairway. There is a vestibule at the Wells Street entrance and anyone standing in the vestibule cannot be seen from the bar. The entrance to the basement is only three or four steps from the vestibule. Because the place was crowded as usual on Wednesday afternoon, September 29th, I cannot say positively whether or not Mossy Joy, Miller and a man named Moore were in my saloon at that time, nor can I say whether or not Heitler was there, but a man named Moore did not bring Mossy Joy and Miller in and the three of them did not have a talk with Heitler, Greenberg and myself about the purchase of whiskey at any time on the 29th of September; nor did Heitler have a talk with Joy, Miller, and myself about the sale of any liquor. I did not hear the defendant Heitler say to Joy or Miller "It is too bad they came in here with Moore. They have to pay $2 or $2.50 extra a case because they came in with Moore." On Wednesday, September 29th, no arrangement was made in my hearing between Joy or Miller or Heitler or Greenberg or Moore or myself about their returning on Thursday, the next day, with money for liquor. I do not remember the exact hour I got to my saloon on Wednesday, September 29th, but I think it was about eleven o'clock. On Thursday, September 30th, 1920,
402 I was in my saloon, but I do not remember whether or not Heitler was in there. I met Heitler on Thursday evening, September 30th, about six-thirty, near the Elks' Club, where we went and had dinner. I remember this was Thursday because the Elks meet on Thursday and this was a meeting night. Heitler and I stayed at dinner about three quarters of an hour and left together about seven o'clock. I went back to my place of business and Heitler did not accompany me, but went off somewhere. He did not

come into my place of business and talk to me again that night. I have not met or talked to Heitler on Thursday, September 30th, up to the time I met him and went to dinner. On Thursday, between one and two, or at any other time, Mossy Joy and Miller were not in my saloon and did not there talk to Heitler, Greenberg or myself, nor did both or either of them pay to me, or to Heitler or Greenberg in my presence, the sum of $10,824 in currency, or any other amount. On that Thursday, I at no time was sitting in one of the booths with Joy or Miller; nor did I see Heitler or Greenberg sitting in one of the booths with Joy and Miller or either of them; nor did I see any money exchanged there; nor did I hear Heitler or Greenberg say to them that they could have more of the whiskey at a certain price or that they could have fifty cases more or thirty-two cases more; nor did I see Joy or Miller in my saloon Thursday night. After I came back from the Elks' Club, I did not meet Joy or Miller, nor did I see Greenberg in my saloon. Joy and Miller were not in my saloon and they did not pay to me, or to Heitler or Greenberg in my presence, $10,824 or any other sum of money at seven o'clock Thursday night, or before I went to the Elks' Club, or after I came back from the Elks' Club. On Friday, October 1st, I got down to work about the usual time. I do not remember seeing Fitzpatrick in there Friday nor did he pay me any money. Joy and Miller did not come into my saloon on Friday between one and two in
403 the afternoon, or at any time before dark, and meet and talk with Heitler, Greenberg and myself about the purchase of liquor; nor did Joy or Miller say to me, or to Heitler or Greenberg in my presence, that they would buy more if a check would be taken; nor did Joy and Miller, or either one of them, go out and come back shortly and give to me, or to Heitler or Greenberg in my presence or where I could see them, a check for $4,950, or any such sum, or any check at all. I was in my saloon Friday evening, October 1st, and closed up about twelve o'clock. My usual closing time is one o'clock. I closed up earlier this particular evening because of a lot of arguments. About eleven o'clock, Friday evening, October 1st, Mossy Joy and Miller came into my place, both intoxicated, and each with a pint bottle of whiskey. Mossy Joy *say-* that he had been stuck up for a couple of truck loads of whiskey. I asked him where and when and he replied that it was on the south side, about an hour or two ago. He then asked for "Mike de Pike" and I pointed to him, sitting at one of the settees playing cards. Joy then said "Mike de Pike knows who stuck me up. He knows the policemen who stuck me up and he was in on the stickup." I replied "Listen Mossy, I don't see how Mike de Pike could be in on the stick-up; he has been here about three or four hours playing cards." He then answered that Mike and I knew who the coppers were that had stuck him up. By this time, Heitler had heard his name mentioned and walked up to Mossy Joy and asked him if he knew him. Mossy said "No, I don't know you, but I heard you was the one that was in on the stick-up." Heitler replied that he had never stuck Joy up and they got to arguing and I told them that they would have to get out, that I was going to close the place. During the argument, Joy

said "If you don't give us our whiskey back, or get us our money back, we are going to jam you up." They did not say that they wanted the money back which they had paid to me. Heitler was in the settee playing cards and had come in about eight or eight thirty.

He was playing with three or four fellows, but I don't remem-
404 ber who they were. I had met Miller about a week prior to October 1st when he and Mossy Joy came into my place and Joy introduced him to me. Joy said that they expected a carload of whiskey about the last of the month and wanted to know if I wanted to buy any. I told him I was not in the market for any whiskey and he said in case I wanted any, that he might be around again. After I put everybody out of the saloon on Friday night, I stayed and made up the cash register. I heard a lot of arguments on the sidewalk. At that time nothing was said by me or Heitler to Joy or Miller about coming back the next day and, if the hold-up was by government men or policemen, they would be paid. I had nothing to do with holding up any of the trucks that night. I was not at 83rd and Vincennes that night, nor was I there helping unload the car; nor was I at 61st and State in the afternoon of October 1st, but was in my place of business all afternoon. Friday afternoon, October 1st, between five thirty and six I paid my rent to J. M. Wandless, the agent of the building. I was not at 79th and Wentworth on Friday afternoon, nor was I at 61st and State, nor 63rd and State, nor was I down there in my automobile directing the trucks where to go or telling them to follow me. On October 1st, I had a seven passenger Stevens Touring Car. I next saw Mossy Joy and Miller the following Saturday afternoon, between one and two o'clock. I do not believe Greenberg was there, nor was he there Friday night when Joy and Miller came in. I think Heitler was there Saturday when Joy and Miller came in. On Saturday afternoon, the 2nd of October, Joy, Miller and Mickey Frank came into the saloon. On Friday night, Heitler, Greenberg and I did not go with Joy and Miller or anyone else in a car to the south side looking for any liquor. When I left my saloon on Friday night I went home. I was not down on the south side Friday afternoon or evening in my automobile, nor Heitler's or Greenberg's. When Joy, Miller and Mickey Frank came in Saturday, I was behind the bar. I think Heitler was there. Mossy Joy came up to me and said

"What are you going to do about that liquor?" I said that
405 I had told him last night that I did not know anything about it. He again said that Heitler and I knew who the police were, that we were in with them and that we had better get him his whiskey or money or they were going through with what they had told us last night. Heitler was standing at this time about five or six feet away and walked up to Mossy Joy and told him again that we had not had anything to do with the stick-up. They again replied that we knew who the coppers were that had stuck them up. They were in the place about fifteen or twenty minutes. They again said that we had better come in with the money or give them the whiskey back, or they were going to jam us up. So far as Joy and Miller were concerned, I could have gotten out of it then, by paying

them the price they asked. I did not follow them out of the saloon on Saturday. I do not think Greenberg was there on Saturday afternoon. The next time I heard about any liquor deal, or Mossy Joy or John Miller, was at the Englewood Police Station. On Friday, I at no time talked with Joy and Miller when the defendant O'Leary was present and did not see O'Leary there at all, nor did I hear O'Leary make any remark about being sorry he did not know about it, he would take the whole carload; nor did I talk with Joy or Miller at any time on Saturday when Simmons was present; nor was I introduced to Fitzpatrick on the sidewalk on Friday morning or Thursday, Friday or Saturday, but I have known him for years. On Saturday afternoon, Joy did not come back to my place again. I do not know who Caruso is and did not send Caruso after Joy, nor did I send anybody to the Elks' Club to get Joy. I did not, on Saturday or at any other time, nor did Heitler or Greennerg in my presence, tell Joy and Miller, or either one of them, that they would be given fifty per cent of the money in cash and fifty per cent in liquor, that a car was coming in every week; nor did I hear
406 any such statement made by anyone, nor did I promise to compromise any claim they were making against me by paying them back money. The next time after Saturday afternoon that I heard about it, was about seven o'clock next morning at the Englewood Police Station. Captain Ryan sent for me and I went. I saw Mr. Heitler when I entered. I saw Joy and Miller a little later on and also saw Mickey Frank. I talked with Captain Ryan and answered his questions. He did not ask me to make a written statement, nor did anyone ask me to. I told him I knew nothing about this carload of Grand-Dad liquor. I was not in the room when Heitler and Mickey Frank met. There was a hearing in the Municipal Court, but no evidence was taken as the case was dismissed. About two or three weeks later, Mr. Heitler came and told me that Mr. Clyne, the District Attorney, wanted to see me. He said "I am going over tomorrow afternoon; you can come over with me. I told him I would take you over there." I saw Mr. Clyne and Mr. Kelly and talked with them. I have told all I know about this alleged conspiracy. I was not in an automobile with Heitler or with Greenberg on Friday afternoon or evening or on Saturday. When Mr. Heitler told me that District Attorney Clyne wanted to see me I did not consult an attorney before I went to see him.

Cross-examination.

By Mr. Glass:

I have been dealing with saloons and restaurants during all my business life. I had known Michael Heitler about six months prior to October 1st, having met him in Hot Springs. During that time, I knew that Mr. Heitler was making second mortgages in the real estate business. He used to come to my saloon three or four times a week. In the day time he would not stay over half an hour. He introduced me to men on several occasions whom I had not known before. He at no time talked about any whiskey deals with me.

Greenberg came in quite often and if Heitler were there, would speak to him, but I do not know what the conversations were.
407 I could not say that I have never gone down into the basement with anybody, but I did not do it often. Anyone on the Wells Street side, facing the bar, could not see people going into the basement. Anyone on the Washington Street side of the bar, about the center, facing the bar, might see someone going down into the basement. I buy my beer from the company Greenberg represents, which company also owns the fixtures. On October 1st, I employed a bar tender, Frank Grossman, and a porter, John Anthony. I am there from about eleven o'clock in the morning to closing time. I know by sight people who come regularly, but I do not know them by name. I have known Mossy Joy for about twenty-five years, but had met Miller for the first time about a week before October 1st, when Mossy Joy introduced him to me in my place. I never heard any conversation about a carload of whiskey in my place. Heitler was not present when Joy introduced me to Miller, which was in the forenoon. Miller said to me that they expected a carload of whiskey in about the latter part of the month and wanted to know if I could use any, and when I said no, they said that in case I did, why they would drop in the latter part of the month and see me again anyhow. Joy told Miller he had known me for a long time. The next time I saw Joy and Miller was on Friday evening, October 1st. I had known Moore since last July or August, having met him in McGrath's office in the Stock Exchange Building. Heitler was present at that time. McGrath introduced me and told Moore that I was a neighbor of his (McGrath's), that I had a saloon at Wells and Washington and Moore said he would drop in and see me sometime, which he did about a week later and asked if I re-
408 membered him. McGrath used to come in once in a while, but not with Moore. I think I was in McGrath's office once after I met Moore, I think sometime before January, 1920, but it was a couple of weeks after Moore first came into my saloon. I went to McGrath's office the second time on a real estate transaction and was there about ten minutes. Heitler was not there. I do not remember whether or not McGrath was in my place after that. I saw Moore one day last week. No one was with me at the time. I do not remember Moore being in my place about the 29th of September, but he might have been there without my knowing it. I had no conversation with him at that time. The first time he came in, in July or August, he said that he had a friend named Johnny Miller who had a carload of whiskey and if I wanted some, I could get it pretty cheap. I did not know Miller then. He did not say anything about the price, but said I could get Johnny Miller at Adolphs George's and if I knew anyone who wanted any whiskey, to go to Adolph George's and ask for Johnny Miller and to be sure to tell Miller that Moore had sent me. The next time I saw him after that was last week. He never came back to find out if I had made any deal with Joy or Miller. I know Quinn, Truedel, and Ambrosi. They might have been in my saloon about October

1st, but I have no recollection of seeing them there. I do not know Simmons, but I know Kane. I do not know William Gorman. I know McGovern. I think his brother was in my saloon several times, but I never saw him, John H. McGovern, in my place. I have known the Franks for five or seven years. I was not at Frank's saloon with Heitler in the month of September, nor have I ever been there with Heitler. I do not know Louis Greengaard and he has never been in my saloon that I know of. I saw Mickey Frank in my saloon on Saturday afternoon, October 2nd, with Mossy Joy and Miller. They asked me what I was going to do about their whiskey, if I was going to give them their whiskey back or pay them their money that they lost on their whiskey. There were quite a few people there, but I do not remember who they were. I do not recollect or remember Ambrosi's being there. The talk was
409 above the natural tone, but I did not catch all that was said because I was pretty busy. Greenberg was not there, but I think Heitler was. Joy was talking to Heitler, but I did not hear what was said. I have known Fitzpatrick for years. He keeps a saloon about a block from mine. I did not see him in my saloon that day, nor the day before, nor have I any recollection of ever seeing him in my place, but I did not have any money transaction with him at that time, nor did I see anyone else have a money transaction with him. I do not believe I ever saw Harry Frank in my place at any time. I do not recollect seeing Joy and Miller in my place on Wednesday, September 29th. I did not see Moore there that day. I met Heitler on Thursday evening, September 30th, near the Elks' Club and had dinner there. After we left, Heitler went west on Washington Street and I went back to my place. Heitler did not come to my saloon again that night, nor did I see him again that night. The next time I saw Heitler was on Friday evening. I do not recall whether or not, I had my car at my place on October 1st, but I might have had it. It is a seven-passenger Stevens Touring car. Heitler has a Hudson, limousine or sedan. I did not see Heitler's car there on Friday, October 1st, but I could not say whether or not it was there. I did not ride in Heitler's car that day, nor on Thursday, nor did Heitler ride with me in my car. I did not see anyone in my place arrange, or hear any talk about arranging, for trucks to go to 83rd, or 63rd and State, or 61st and Wentworth, or 61st and State, nor did I see anybody there with a slip of paper directing where the trucks should go, nor did I see any trucks standing outside of my place on October 1st. There are always a lot of automobiles parked around there every day. I do not know whether Harry Frank or Mickey Frank has a car. I arrived at my place at the usual time, about eleven o'clock, and stayed there continuously until twelve o'clock that night. I was not at 63rd and State Street that day, nor was I at 83rd and the team track of the railroad at Vincennes. Joy came to my place on Friday night about eleven thirty with Miller. Merle was not with them. I know Merle, but never saw him in
410 my place. He never gave me any money for any whiskey. I have not seen him since this trial started. The last time

I saw him was years ago, I don't remember how many, when he was in the saloon fixture business. When Joy and Miller came in Friday, about eleven thirty, they were complaining about having been held up and having had two loads of whiskey taken away from them and they said that Heitler knew something about, that he knew the coppers that held them up and that he was in on it. I did not hear anything said that night, or at any other time, about protection against police and government officers. Heitler was in my place on Friday night, about eight or eight thirty, playing cards. I do not know with whom he was playing and, outside of his ordering cigars, a bottle of near beer or something like that, I had no conversation with him and did not talk about whiskey. Joy got very noisy and I told them all to get out; that I was going to close up. Heitler and Heitler's driver and the three gentleman Heitler was playing cards with were there at that time. I do not know if Heitler's car was there, but his driver was. I do not know the names of the men with whom Heitler was playing cards. They have been in the place a few times. Friday evening, Joy first talked to me and when Heitler came up, talked to him. He said Heitler was in on the stick-up and I told him that Heitler had been there all evening. Joy wanted his whiskey or the money he had paid for it. It is not a fact that after closing up, I got into Heitler's car with Mossy Joy and drove all over the south side and stopped at 64th and South Park Avenue at Cullen's Place and other saloons; nor is it a fact that after being on the south side and after letting Greenberg out, I went to the Mid City Express Company's garage on the west side at Van Buren and Sangamon, as I did not go in the car at all. I next saw Joy and Miller on Saturday afternoon, about one thirty or two o'clock, together with Mickey Frank. Heitler was there a little ways off. Joy asked me what I was going
to do about two loads of whiskey he lost the night before.
411 I told him I did not know anything about it and Heitler,
who was a few feet away, came over and said "You fellows are crazy, accusing us of sticking you up. We don't know anything about it." Mossy Joy said, "Well, you got to make good that whiskey or pay us the money for that whiskey or we are going to go through with our threat." I did not hear anything said about seeing Chief of Police Garrity. Neither Mickey Frank nor Miller had anything to say, as Joy was doing all the talking. They were there about fifteen or twenty minutes. Everyone around the bar could hear everything that was said. All three left together. Greenberg was not there. I do not know whether or not Nick Ambrosi was there. I do not know O'Leary and never saw him in my place. The case at the Englewood Police Station was dismissed.

Redirect examination.

By Mr. Kirkland:

I did not keep any record or written memorandum of the date when Moore called on me the first time at my saloon.

Recross-examination.

By Mr. Glass:

I never paid any money back on account of this whiskey deal to anybody. I think I know Todd, but I do not know whether or not his first name is Edward. I did not go to Madison and Paulina or to Chicago Avenue and Paulina or in that neighborhood and meet Edward Todd at a pool room with Heitler, nor did I have a check for $1,200 and offer it to Todd, nor did I ever give him any money at any time, nor did I meet anybody there.

Cross-examination.

By Mr. Dunne:

I called at O'Leary's place several times when I was in the glassware business but never found him in and never did any business with him at any time and never met him until I met him in the courtroom. His place of business is opposite the entrance to the stockyards on Halsted, near Root street. I have never been to Mickey Frank's saloon with Heitler or Greenberg, nor did I
412 ever go there with Heitler when Heitler had $7,000 and paid it to Mickey Frank, nor did I ever give Heitler any money to give to Mickey Frank, nor did I ever give anybody any money on account of a whiskey transaction.

GEORGE H. MEYER.

Direct examination.

By Mr. Symmes:

My name is George H. Meyer. I live at 557 Fullerton Parkway. I am and have been for fifteen years an attorney at law practicing in Chicago. I am an instructor in an evening law school and have known George Hans since September 19, 1917. I was one of his instructors until he was graduated in June, 1920. I am acquainted with his general reputation for truth and veracity and as a law-abiding and peaceable citizen among the students and among the persons he associated with in the law school and that reputation is good.

Cross-examination.

By Mr. Glass:

I never had any transactions with him other than as an instructor in law school. He was under my observation and was discussed from time to time as a man and as a student, but I cannot say with whom in particular.

ARTHUR F. WEBBER.

Direct examination.

By Mr. Symmes:

My name is Arthur F. Webber. I live at 2131 Morris Avenue, which is five blocks from the home of George Hans. I am a police officer attached to the Summerdale Station. I have known George Hans since October, 1918. I know his general reputation for truth and veracity and as a peaceable law-abiding citizen prior to October 1, 1920, among police officers and among his neighbors. That reputation is good and knowing his reputation I would believe him under oath.

Cross-examination.

By Mr. Glass:

In October, 1918, I was elected on a committee to investigate his character and I first went to the property owner of the building that he lived in, Mr. Bright, who spoke very highly of him and said that he had a good character, was honest, had very good habits, a good moral character and was very studious. I also went to Mr. Henry Feltes, who belonged to the order for which I was investigating Mr. Hans.

413

Redirect examination.

By Mr. Symmes:

I was on the committee of the Masonic order. In my capacity as Secretary to the Captain at Summerdale, I receive the complaints made against police officers. I never received any complaints whatsoever against George Hans.

HENRY FELTES.

Direct examination.

By Mr. Symmes:

My name is Henry Feltes. I live at 2045 Estes Avenue. I am in the painting and decorating business at 7055 North Clark Street. I know George Hans and live in his neighborhood. I know his general reputation for truth and veracity and as a peaceable and law-abiding citizen prior to October 1st, 1920, in the neighborhood in which he lives. That reputation is good.

Cross-examination.

By Mr. Glass:

I belong to the same organization that George Hans belongs to.

Redirect examination.

By Mr. Symmes:

That organization is the Masonic organization.

JOSEPH JAFFRAY.

Direct examination.

By Mr. Symmes:

My name is Joseph Jaffray. I live at 341 South Humphrey Avenue and am in the coal mining business—Jaffray & Stern Coal Company, 130 North Wells Street, Chicago. I have known
414 George Hans for seven years. I know his general reputation in and about the city of Chicago for truth and veracity prior to October 1st and as a peaceable and law-abiding cit-zen. His reputation is good.

Cross-examination.

By Mr. Glass:

My residence is on the west side. I once considered Hans for a position and talked with my partner and a great many people in the city of Chicago and to different police officers and business men I knew to see if his reputation was still the same as when I met him in 1914 and during the number of years when I was chairman of an executive board of a corporation. I cannot remember offhand the name of anyone with whom I discussed his reputation.

MICHAEL HEITLER, One of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

My name is Michael Heitler. I live at 2404 McLean Avenue. I am forty-three years old. My family consists of a girl of twelve and a boy of seventeen, who is attending a university in this state. I was born in Austria and have lived in Chicago twenty-one years. I left Austria when I was thirteen and went to New York City alone. I could not speak English then. I landed to Castle Garden and my married sister took me to her home. Up to that time I had never gone to school. About two months later, I went to work in a cigar factory and worked there about eight years. I turned in my pay to my sister until I was seventeen years old. I have not gone to school at any time. When I was twenty-one, I came to Chicago with $1,200 which I had saved and opened a restaurant at Randolph and Peoria Street with my elder brother. I learned to talk English and

ran the restaurant for about three years. At the end of two years, I bought the saloon opposite the restaurant. Before I came to Chicago, I went to Nome, Alaska, and stayed there about four months. I have owned several saloons and cigar stores. I
415 am now making second mortgages on real estate and am interested in other real estate transactions. Before October 1st, 1920, I did not know Mossy Joy or John Miller. When I was in the saloon business on Randolph and Peoria, Mr. Greenberg came to sell me some beer and I have known him from that time. I first became acquainted with the defendant Perlman last year at Hot Springs. After returning to Chicago, I saw him three or four times a week in his place at Wells and Washington. I went there to have my lunch and sometimes in the evening I would play cards there. I do not know the defendant O'Leary and had no business dealings with him, nor have I ever sold him any liquor since the country went dry. I never saw the defendant Truedel before I came to this court. I have known McCann for several years. I used to go into Righeimer's to have lunch and buy cigars before I knew Perlman. Before this trial, I did not know the defendant Quinn or Callaghan. I was not in a saloon kept by a man named Callaghan late Friday night, October 1st, or early in the morning of October 2nd, with Mossy Joy; nor did I hear Mossy Joy say to a man named Callaghan at any time that he had been buying liquor from me. I do not know Timothy Judge, nor did I ever have any business dealings with him. I first saw Galvin in the court. I never had anything to do with Mossy Joy or told him I gave Sgt. Judge a "Grand." I did not at any time before October 1st, 1920, have any agreement or understanding or any talk with any of the defendants in this case or anyone else not mentioned in this case in regard to bringing or buying a carload of Grand-Dad whiskey from Kentucky. I do not know Berkson, nor did I send him to Kentucky to buy a carload of whiskey, nor did I talk with or agree with any of the defendants or anyone else to send Berkson to Kentucky to purchase liquor. The first time I saw the defendant Gindich was in this courtroom. I never made any arrangements with any of the defendants or with anybody else to send a man named Berkson to Peoria, Illinois, to get a car-
416 load of liquor reconsigned to Chicago; nor did I send, or arrange or talk with anybody else about sending, a man to Peoria who was to say his name was Berkson and get a carload of liquor recognized; nor did I have anything to do with unloading a carload of liquor at 83rd and Vincennes in the afternoon or evening of October 1st, 1920; nor did I agree with anybody or make any arrangements with anybody about unloading a carload of liquor in Chicago. I did not, either alone or with Perlman, Greenberg or anybody else, send out people to get saloonkeepers or anybody else to buy any part of a carload of liquor around the 1st of October, 1920; nor did I collect any money from different people to pay for a carload of liquor which arrived in Chicago on the 1st of October, 1920. I know a man named Moore. I did not, on October 1st, 1920, or at any other time, send Moore out to get people to buy liquor from me; nor did I talk to Greenberg or Perlman in regard

to having Moore go out and solicit people to purchase any of this carload from me; nor did I have any arrangement with any other defendant or defendants to buy liquor from me. I did not, in the middle of September, 1920, go with Perlman to the saloon of Mickey Frank on North Clark Street and ask Frank if he was in the market for any liquor, nor have I ever been in the saloon of Mickey Frank on North Clark Street, nor have I ever had any business dealings with him. I know Mickey Frank, but do not know Harry Frank, Louis Greengaard, the witness Fitzpatrick or his son. I did not hire anybody from the Mid City Express Company to move liquor for me on the 1st day of October. I did not, alone or with Perlman, go on the 22nd or 23rd of September to the saloon of Mickey Frank and ask him again if he was in the market for any liquor, nor did I talk about the price and tell him it would cost him $125 a case, or any other price. I never saw or had a conversation with Moore, Mossy Joy and Miller in Perlman's saloon on
Wednesday, the 29th of September, 1920, in which I told
417 Miller and Joy I would let them have thirty or forty or
fifty cases of liquor, nor did I ever say to Miller or to Joy that I had just got $30,000 from Nick Hunt for liquor or any other purpose; nor did I say to them that Senator Broderick had just given me $15,000; nor did I ever have any conversation with Nick Hunt at any time about any liquor or any money; nor did Senator Broderick at any time give me $15,000 for any liquor. I did not say to Joy or to Miller that it was too bad that they came in with Moore, that they could have gotten the liquor for $2.00 or $2.50 a case cheaper. I met Mossy Joy and Johnny Miller in Perlman's saloon on Friday, October 1st, about eleven thirty or a quarter of twelve at night. I do not recall being in Perlman's saloon on Wednesday afternoon, September 29th, but I have no way of telling whether I was or not. The first time I ever saw Mossy Joy was on Friday, October 1st. I did not meet Mossy Joy and Johnny Miller at Perlman's saloon on Thursday night, about seven o'clock; nor did they at that time pay to me, or pay to Perlman in my presence, a large sum of money like $10,284; nor did I have any talk with them at that time about their getting fifty or thirty more cases. On Thursday afternoon, I had been at 1814 W. Harrison Street for two or three hours trying to buy a factory there. I left there about four o'clock and went to the office of Mr. Cohen, my attorney, and stayed there about fifteen minutes. Mr. Cohen was not in. I was going to Perlman's to have some lunch that night and met him outside the Elks and ask him where he was going. He replied that he was going up for dinner and asked me to go with him, so we went to the Elks' Club about six thirty or a quarter of seven. I had not been in his saloon that day. We stayed there about three quarters of an hour and when I finished I went into a place on Washington Street kept by Weiss, stayed there about fifteen minutes, until my car came, and then went out on the west side. Perlman started walking toward his place, but I did not go into his place that night. I got home about ten thirty or eleven o'clock. I have a car and a driver, but I cannot drive myself.

418 The car is a seven passenger automobile with permanent top. The name of the driver is Al Jergensen. I did not have any appointment to meet Miller, Joy, Mickey Frank, Harry Frank or Louis Greengaard in Perlman's saloon on Friday morning; nor was I in Perlman's saloon on Friday morning, the 1st of October; nor did I see Harry Frank or Louis Greengaard there; nor did they then and there pay to me, or pay to Perlman or Greenberg in my presence, the sum of $13,000 in currency. I did not see Fitzpatrick in Perlman's saloon when he paid any money, nor was I in the basement with him, nor did I ever send anybody to him, to the Franks or to Greengaard to ask them to buy liquor from me. I do not know anyone named Joe Reilly. I never talked to McCann about getting Fitzpatrick or anybody else to buy liquor from me. On Friday morning, I left the house about ten thirty or eleven o'clock and went to State and Madison Streets to meet a friend. About five minutes later, I went to Mr. Cohen's office, arriving about a quarter after eleven and stayed there about five minutes. I then went to 815 W. Maxwell Street, which is a restaurant where I played cards. I stayed there until about two o'clock. I then went to Harrison Street, to the factory which I was trying to buy, and then went back to Mr. Cohen's office with Mr. Schar. Mr. Cohen is my attorney and looks after my business. We got to Mr. Cohen's office about a quarter after three. He was not there and we waited about three quarters of an hour or an hour, but he didn't come back, so we left. Mr. Schar and I went to a picture show on Clark near Madison. Mr. Schar, who owned the factory, has had a stroke of paralysis and is now crippled. I do not know where he lives, but his factory is at 1814 W. Harrison Street. About a quarter after five, we came out of the movies and went back to Mr. Cohen's office. About five
419 minutes later, Mr. Cohen came in. About ten minutes after six, Mr. Cohen, one of his stenographers and I went to dinner in a restaurant at Dearborn and Randolph. We left there about seven thirty and I met my chauffeur and went to Mr. Perlman's saloon. I left my car standing on Wells Street. I bought a cigar and a drink and was standing at the bar when three fellows came in. I had played pinochle with two of them before. They said they were going to a show and I asked them if they would like to play pinochle for a while. They said yes and we sat down and played. I sent my chauffeur away to a show. When I went into the saloon Mr. Perlman was behind the bar. I stayed in the saloon until a little after twelve. About eleven thirty or a quarter of twelve, Mossy Joy and Miller came in. I was playing pinochle with Harry Cohen and Louis Feldman, who was a chauffeur in the La Salle Garage. The third man was Joseph Hoffman. Hoffman lives at 2222 W. Taylor Street and Feldman lives at 1644 Lawndale. We were playing pinochle for twenty-five cents a hundred. I have, while running saloons, gambled, bet on horse races, had poker games in the saloons I ran and have played poker for money. While we were playing pinochle, Perlman was behind the bar. There was no bar tender there that night. I was sitting on the south side in a booth and did not see Joy and Miller when they first came in. They started to talk

to Perlman about whiskey. They said "Where is Mike de Pike?" I turned around and saw they were both drunk. That is the first time that I had ever seen either one of them in my life. They said "Where is Mike de Pike," and Perlman asked them what the matter was, they replied, "He is the one that had me stuck up." Perlman asked what it was he had stuck up and he replied that he had two truckloads of whiskey and that they had taken his pin and ring. I *I* got up and walked over to them and asked what the trouble was. Mossy Joy said to me, "You are the one that had me stuck up for the whiskey. I know you had them coppers stick me up and I want to get that whiskey, if you don't get me back that whiskey
420 you will have a lot of trouble, Mike." I said, "You are crazy. What are you talking about? Stand up, stand up against the bar." We started to argue and he tried to make a swing for me, but I dodged it. Perlman came from behind the bar and told him to keep quiet and finally said that we would all have to leave as he was closing up. They went out one door and I went out the Wells Street door with the fellows I had been playing pinochle with. My chauffeur was there and I took the three men as far as Rosewood and Newberry Avenue and then went right home. I got there about one or shortly after. I was playing pinochle in the center booth. I did not say to Joy or Miller to come Saturday and I would return his money if I found out he had been stuck up by government men or police officers. I had not gotten any money from him that I should return, nor had I, up to that time, ever seen Joy or Miller before, nor did I make any engagement to meet them on Saturday. On Friday, October 1st, I was not at State and 61st in my automobile, nor did I meet Greenberg or Perlman at 61st and State Street- at any time that afternoon, nor was I at 63rd and State Street- in the afternoon; nor did I meet Greenberg or Perlman or the Franks or Mossy Joy or Miller at 63rd and State Street-; nor was I at 79th and Wentworth or at 59th and Wentworth; nor did I meet any of those people that afternoon, nor did I give any directions to any men driving trucks down on the south side to follow my car; nor was I at 83rd and Vincennes when a carload of Grand-Dad liquor was unloaded on Friday afternoon and evening, October 1st, nor did I see Greenberg or Perlman or any of the defendants at any truck or carload of liquor on the 1st of October, 1920; nor was I at a carload of liquor at 83rd and Vincennes; nor did I see Mossy Joy and Miller, nor did I hear them say they had been held up, nor did they come to 83rd and
421 Vincennes and tell me they had been held up, nor did Mickey Frank or Harry Frank or Louis Greengaard do that. I was in Perlman's saloon on Saturday, about two o'clock. I generally go there on Saturday for a little lunch. Perlman was there. About forty or fifty other people were there. I saw Joy and Miller there that day. Greenberg was not there. I did not see Mickey Frank. I did not have any talk with Joy on Saturday afternoon in Perlman's place, nor did he say anything to Perlman in my presence, but I heard Joy talking and hollering to Perlman about the same thing as the night before. I heard Perlman ask what they

were talking about and tell them to keep still, I did not owe defendants McCann, Truedel or Quinn any commissions for the sale of liquor. I did not hear Mossy Joy tell McCann to keep out of it and let him get his $20,000 and he would pay McCann his five or six hundred. On Saturday, Joy did not say to me that he was going to see Chief Garrity right away and I did not use an indecent expression to him and say that I had something on Chief Garrity or a lot of policemen. I left about three fifteen. On Friday afternoon, October 1st, I did not see Joy and Miller about two o'clock in Perlman's saloon, when they say they gave me checks or money for liquor. After I left Perlman's saloon on Saturday afternoon, I went to 16 North Clark Street, upstairs to the restaurant, and stayed there until about five thirty. I met my wife and my little girl at the Boston Store with my car and we went home. I did not come downtown again that evening. About midnight Saturday, someone rang up on the phone. I went to the phone and it was a Tribune reporter. Then Captain Ryan called up. Then Mossy Joy called up and said that he had spoken to a Tribune reporter and if I did not give him the money or the whiskey back, he would have me jammed in so far I would never get out. Then I got another call from Captain Ryan. I went to the police station about two o'clock Sunday morning and saw Captain Ryan. I was taken to his room and Mickey Frank, Mossy Joy, Miller, two Tribune reporters and Fitzpatrick were there. The Captain sat me down along side
422 of Mickey Frank, took out a paper and started to read Mickey Frank's statement. I told the Captain that I never had anything to do with any whiskey and said that those fellows wanted to job me. I turned to Frank and asked if he had seen me within the last two weeks and he replied that he had not. The Captain then asked him why he made the statement and Frank replied "Well, I didn't know what I was talking about. I did not draw my hand or my finger across my throat or put my hand up to my throat, nor did I say anything to Frank in Yiddish. I was not asked to make a statement in writing. I got out on bail at five o'clock the next afternoon and a few days later went to the police court. I took with me the men I had been playing cards with Friday night. No testimony was taken. A few days after I was discharged from Englewood Police Station, I called up my home a little after three. I call up every day at that time to find out if the little girl has gotten home from school. My wife told me she had read in the paper that Dalrymple was looking for me. I bought a paper and had it read to me, as I cannot read. I learned that Dalrymple was looking for me and I went right up to his office on Dearborn Street and had a talk with him. Mr. Dalrymple told me that he had sent some fellows to look for me, that he understood I knew something about a car of whiskey and had been down to the car to get the whiskey. I told him that I knew nothing about it, except that I had been accused by Mossy Joy and Miller of having policemen hold them up and take the whiskey from them. He asked if I would return, as he wanted some fellows to look me over. I agreed and he said to be there at ten o'clock. I did not have anything to do with

holding up the trucks of liquor on Friday, October 1st, nor did I hire any police officers or anybody else to hold them up. I did not see George Hans on Friday night in Perlman's saloon, nor did I go out that night in anyone's automobile with Hans, Joy or anybody else to the south side looking for the liquor or the trucks.
423 I went back to Major Dalrymple's office. I did not go to see a lawyer before I went to Major Dalrymple's office, either the first or the second time. Major Dalrymple was not in the second time and I saw Mr. Callahan and Mr. Kilcourse. They took me into a large office and some fellows looked me over and then Mr. Kilcourse told me to go home. About eight or ten days later, I called my home at the usual time and my wife said some men from the District Attorney's office were looking for me, so I went to the District Attorney's office, about a quarter past four, told them who I was and asked for Mr. Clyne. Mr. Kelly came out and told me he understood I had a carload of whiskey and had sold it and I told him I knew nothing about any whiskey. He told me he did not want to get me, but he wanted to get the police department and Chief Garrity. I told him I had nothing to do with the police department or Chief Garrity and did not know him. At seven o'clock, Mr. Kelly returned and said he would be back at eleven o'clock. Mr. Kelly called up at eleven o'clock and they took me to the Great Northern Hotel to sleep there until morning. About eight thirty, I came here to the Federal Building and Mr. Kelly came in again. They asked me to come back to the office the next day and bring Mr. Perlman which I did. I did not see an attorney before I took Mr. Perlman over. Then I was indicted.

Cross-examination.

By Mr. Glass:

I have been in Chicago about twenty-one years and all the time I have been in the saloon or cigar or restaurant business. The restaurants were not connected with the saloons. I had one restaurant at 1105 S. Halsted Street near Taylor in 1915 and 1914. At that time my saloons were at Monroe and Halsted and at Madison and Carpenter. I was at Madison and Carpenter in 1912. I continued those places until 1916, when I sold both of them. I used
424 to buy saloons, keep them for a year or so and then sell them. In 1916, I had a saloon on Curtis Street between Madison and Washington and kept it for about a year and a half. The only place I worked in during this time was Monroe and Halsted and my partners took care of the other places. I had a cigar store on Washington Boulevard between Green and Peoria and before that on Washington Boulevard between Halsted and Madison. The last saloon I had was in Burr Oak, called the Wigwam Cafe. It was not a house of prostitution nor was there a hotel or house of prostitution upstairs. There were rooms upstrairs, but there were no women there. I had a cigar store, but discontinued it fourteen months ago. I never had anything to do with saloons or hotels at Gary or Hammond, Indiana, nor was I partner of Max Wagman in the

Chicken Coop at Hammond, Indiana. I did not know Wagman in 1914, nor did I know anybody by the name of Max the Bum, nor did I have anything to do with any hotels, or with saloons in any city except Chicago.

Q. Now, you were convicted in 1916 in this court, were you not?
A. I was found guilty.
Q. And convicted?
A. For loaning a fellow $5——
Q. No, now——

Mr. Kirkland: Let him finish his answer.
Mr. Glass: No, I object to——
Mr. Kirkland: I submit he ought to be permitted to finish.
Mr. Glass: —to anything like that.
Mr. Kirkland: The question I object to, the question you were convicted. It may have been a misdeameanor, it may not have been an infamous offense at all. As I understand it, you can't affect a man's credibility by showing that he has been convicted of anything except an infamous offense.

425 The Court: I don't know, but you can ask him as to whether he was convicted. He may find out about the sentence and judgment. You may ask him about that.

Mr. Glass: Yes.

Q. And you were sentenced to serve one year and a day in the penitentiary at Leavenworth, Kansas, weren't you?
A. Yes, sir.
Q. And you were released at that time——

Mr. Kirkland: Wait a minute. That is objected to as immaterial.
The Court: Read the question.

(Question read.)

The Court: Is there an answer?
The Reporter: No, sir.
The Court: He may answer.

A. Yes, sir.

Mr. Glass:

Q. And you were charged in the indictment in which you were convicted with violation of the Mann Act, or White Slave Act?

Mr. Kirkland: That I object to.

A. No, sir.

Mr. Kirkland: He wasn't charged with that.

The Court: What is the answer?
A. No, sir.

Mr. Kirkland: What the indictment charges I object to as immaterial. The question is what he was convicted of.

426 Mr. Glass: That was the charge of—Has the Court ruled on that?

The Court: The Court rules that he may——

Mr. Kirkland: Go ahead. That is all right; I will withdraw the objection.

The Court: The Court ruled that he might answer.

Mr. Glass:

Q. And were you not charged with a violation of conspiracy——

Mr. Kirkland: Violation of conspiracy?

When I came back to Chicago, I went into the restaurant business at 27 North La Salle Street for about three months in partnership with one Zimmerman. I then bought the place at 119 and Wood Street, at Burr Oak, and kept it about two and one half years, when I retired. It was later closed up, but I was not the propietor at that time. I know Mr. Perlman and go to his place three or four times a week. I know quite a number of saloon keepers. I have known Mr. Greenberg about fifteen or sixteen years and used to buy beer from him. Perlman told me in Hot Springs where his place of business was. I went there and continued to go there as I liked the lunch. Sometimes I would go in there in the evening for a light lunch and stay and play pinochle or rhummy. I continue to visit there right to the present time. I do not remember being there on September 29th or 30th, but I am not sure whether I was or not. I was there on October 1st, but I was not there most of the day, nor in the afternoon. The first time I went to Perlman's saloon on October 1st was about seven thirty or a quarter of eight. I met Perlman there, but did not meet Greenberg or anyone else that night that has been connected with this case until eleven thirty or a quarter of twelve, when Joy and Miller came in. I had never seem them before. Joy accused me of knowing about the
427 hold-up of certain truck loads of whiskey. There was no talk about telling the police if he did not get his whiskey or his money, but he said that if he did not get back his whiskey he was going to fix me. I know of no reason why Joy or Miller should come to me, as I had never seen them before that night. I know Moore, but never saw him in Perlman's place at any time. I was not present at any conversation between Perlman or Greenberg and Moore when Moore was directed to meet Mossy Joy and Miller and have them come to Perlman's saloon about some whiskey, nor was I present at any conversation in Perlman's saloon on September 29th or 30th in which Joy and Miller were told about a car load of whiskey coming in, of which they could buy a hundred cases or more at $130 or more a case. I do not know a man named Merle and have never met him or seen him to my knowledge. I know Nick Hunt, who is the head of a detective agency in the city. I have known Senator Broderick for about twenty years. He was in the saloon business. On September 30th the driver brought my car down about ten thirty in the morning and put it in the garage. I do not know what garage he puts it in. My chauffeur is with me whenever I am in the car.

On September 30th, I left Cohen's office about six o'clock and was going to Perlman's saloon to have a little lunch. I met Perlman a little after six or about six thirty and he and I went to the Elks' Club and had dinner. I am not a member of the Elks' Club, but Perlman is. We were there about three quarters of an hour. I did not go back to Perlman's saloon, but I went to Weiss's place and stayed about fifteen or twenty-five minutes. I saw Mr. Weiss and I I saw his bar tender, whose name I do not know, and a lot of other people whom I do not recall. After leaving there, I went to 815 Maxwell Street, a restaurant owned by one Altman, and played pinochle or poker. I stayed there until about eleven or eleven thirty, when my chauffeur came for me and drove me home, where I stayed all night. I next went to Perlman's saloon on Friday, about
428 seven thirty or a quarter to eight in the evening. I was not in Perlman's saloon at any time on the morning of October 1st, nor did I see Fitzpatrick, Joy, Frank, Greengaard or Miller there. I did not know O'Leary at that time and saw him here in Court for the first time in my life. I could not tell whether or not he was there at that time as I was not there. I do not know Quinn. I know Truedel and McCann, but did not see them there that morning, nor have any talk with them. On Friday, October 1st, I stopped there on the way to the west side. The men with whom I played cards were not there, but came in about a quarter of an hour later. We played until about eleven thirty, when Joy and Miller came in and said I was in on the hold up. That was the first time I had ever heard about any whiskey or any transaction in regard to a carload of whiskey and I had never talked with anyone about a carload of whiskey. After the argument, I went out the Wells Street side and Joy went out the Washington Street side. Perlman stayed inside, closing up, when I left. The three men with whom I had been playing cards got in my car and we drove to Rosewood and Newberry Avenue, taking about fifteen minutes. I let them out there and then went home. I did not go into a car with Mossy Joy and Miller and go out on the south side to see if I could locate where the whiskey went or who had stolen it or find the trucks that had been held up, nor is it a fact that Hans, Garrigan and Greenberg went in the car. I did not see Hans that night, nor did I let Greenberg off at Michigan Avenue and 50th Street at the Lyons Hotel; nor is it a fact that after that I drove to the west side and went to the Mid States Garage to see if the trucks that had been hauling the whiskey had come in yet; nor did I see at the Mid States Garage that man (indicating one Christie); nor was I at 61st or 63rd and State or at the railroad tracks of the Rock Island, at 83rd and Vincennes, at any time that day. I was at Perlman's saloon on Saturday, October 2nd, about two o'clock in the afternoon and saw Joy and Miller there. They were still
429 arguing about their loss of whiskey. I did not see Nick Ambrosi there, nor do I know him. Joy was talking pretty loud, but not as loud as on Friday night. On Friday night, nobody was in the saloon with us except the three men with whom I was playing cards. On Saturday, thirty or forty people were present.

On Saturday, Joy was talking to Perlman and I was standing there and told him he was crazy to talk to me like that. I was there about fifteen minutes and left. I do not remember whether or not Joy was there when I left. He did not talk to me all the time, but he talked to Perlman and to me also. I did not hear him say anything about notifying the police, but only that he would get even. I left about two fifteen, but cannot tell the time exactly. No checks were at any time handed to me there by Joy and Miller or Merle in payment of whiskey, nor did I ever try to cash or have certified any check given me by Joy or Miller or Merle, nor did I try to certify any check for $4,940. I met my car about five or six o'clock and went to the Boston Store and then went home, where I remained until about two o'clock in the morning, when the officers took me to the Englewood Police Station. I did not talk to Mossy Joy or Perlman or Miller, nor did I have anyone talk to them, about going out of town until after the case was disposed of. When the case came up, nobody was there to prosecute and the case was dismissed. Later on, I talked to a government man from Mr. Dalrymple's office and after that I talked to Mr. Clyne and to Mr. Kelly. I do not know a man named Edward Todd, nor was I ever at the Chicago Avenue and Paulina Pool Room with Mr. Perlman to see Todd, nor did I, at this pool room at 12th or at Chicago Avenue and Paulina, tender to Mr. Todd a check for $1,200 as part reimbursement on this whiskey deal, nor did I later on send in an envelope any amount that was due him on account of a whiskey deal, either by myself or together with Mr. Perlman.

430 Redirect examination.

By Mr. Kirkland:

I did not go to Mickey Frank's saloon and give him back $7,000, nor did I go up there a week or so, or at any time, after the case was dismissed at the Englewood Police Court and, having $7,000 in my pocket, take Mickey Frank in the back room and give it to him, nor did I tell Mossy Joy over the telephone to "take the gate"—meaning that he had better get out of town.

Q. Now, what were you convicted of?
A. I was convicted of the conspiracy of loaning a fellow five dollars, and he took a girl over to Gary, Indiana.
Q. Were you charged with taking a girl into a hotel or any place?
A. No, sir.

Cross-examination.

By Mr. Dunne:

I was not in Perlman's saloon in the morning or afternoon of October 1st, but went there after dinner, about seven thirty in the evening. I never had any conversation with Mr. O'Leary about any matter of any kind.

Recross-examination.

By Mr. Glass:

I never saw anyone in Perlman's saloon with a list of names showing who was to get the whiskey from this carload.

ELMER JOERGER.

Direct examination.

By Mr. Symmes:

My name is Elmer Joerger. I live at 3926 North Albany Avenue. I am the chauffeur of the defendant Michael Heitler and have worked for him a year and six months. Prior to that time, I served in the army in France. I had never worked for Mr. Heitler before, nor did I know him before. Mr. Heitler's car is a Hudson limousine. He keeps it in Quinn's garage, near where he lives. Mr. Heitler never drives the car. I do not know Mossy Joy or
431 John Miller. The first time I saw them was in Perlman's saloon, between eleven and twelve at night. I do not remember the day of the week or the day of the month, but I remember I drove to Champaign on the Sunday morning following a day when Mr. Heitler had had some trouble. I never saw Mossy Joy or Miller in that saloon before or after that time. I got Mr. Heitler at six o'clock that evening in front of the City Hall Square Building. He said he was going to have dinner and for me to come back about seven thirty. I met Mr. Heitler again in front of the City Hall Square Building at seven thirty and took him to Fifth Avenue and Washington, to Perlman's saloon. I was there about fifteen or twenty minutes when he told me he would stay for some time playing cards or would go to a show, so I left. Some people were in the saloon at that time, whom I do not know. I do not know Mr. Feldman, Mr. Cohen or Hoffman. I returned about ten thirty or eleven to Perlman's saloon and Mr. Heitler was there playing cards with two or three men. He told me to wait a little while and I was standing where they were playing when two men came in, walked up to the bar and started talking to Perlman and said something about Mr. Heitler having held them up for some whiskey. Mr. Perlman said something to the effect that Heitler had been in there all evening playing cards and he couldn't see how he could have held them up. In the meantime, Mr. Heitler stood up and said something to Mossy Joy. I heard Mr. Perlman address the man as Mossy, but did not hear the name Joy that evening. He said that Mr. Heitler had held him up with some policemen for his whiskey and some diamonds and then Mr. Perlman got up and said he was going to close the saloon. Heitler said he had been in there all evening playing cards and that he did not hold him up. I went out and got the machine. Mr. Heitler came out with the

men he had been playing cards with and I drove them to 12th and Halsted and then drove Mr. Heitler home. Then I took the car to the garage. The time when this occurred was two days be-
432 fore the Sunday when Mr. Heitler was arrested and taken to the Englewood Police Station. I had never seen the two men in there before that time. I heard something said about a diamond pin that was taken away from him, but I didn't hear them say anything about a diamond ring. They were in there about fifteen minutes.

Cross-examination.

By Mr. Kelly:

Mr. Heitler first told me I was to be a witness a week or so later, when he asked me to be a witness at the police station. I spoke to Mr. Cohen, Mr. Heitler's lawyer, on the way to that hearing. The time I have mentioned was the only time on October 1st that I was at Perlman's saloon. In the morning, I took Mr. Heitler downtown about twelve o'clock to the City Hall Square Building and went back and took his wife downtown. I returned about six o'clock and went upstairs to Mr. Cohen's office and Mr. Heitler said that I should come back later, as he was going to dinner. I do not remember being in Perlman's saloon at any time the week previous, though I might have been. I talked with Mr. Heitler about two months ago and he took me to the Tribune Building, where I saw Mr. Kirkland and Mr. Symmes. I had not seen the men before, that I took home that evening. I have worked for Mr. Heitler a year and six months and am still working for him. I was born in Chicago, State of Illinois, and am twenty-seven years old. Before I worked for Mr. Heitler, I worked for the Carstens Manufacturing Company for three years and a half at 411 South Clinton Street and between that time and the time I worked for Mr. Heitler I was in the army. Before that, I worked two years for the Crane Company and before that, for the Sanitary Herald Company. I have never been convicted of any offense, nor have I ever served any time. I am not sure how many people were in Perlman's saloon that night, but there were not very many. That was the first time I had ever been in Perlman's saloon. That was the only time I have taken Mr. Heitler home from Mr. Perlman's saloon late in the evening, though I have been there in the afternoon. I do not know
433 whether or not this was October 1st. I was in the saloon about half an hour standing up near where they were playing cards. I saw several men come in while Mr. Heitler was playing cards. They stayed about fifteen minutes. When I came out to get the machine, five or six cars were standing there. I heard Perlman tell them all to get out, that he was going to close up. I did not stay until he closed up, but went out. In a few minutes Mr. Heitler came out. I took the three men who had been playing cards to 12th and Halsted. They got off in front of a lunch room. I had never been there before. This was the only time I had ever seen these men.

Redirect examination.

By Mr. Symmes:

I did not, on that night or any other night, drive Mr. Heitler to Gresham Station, at 83rd and Vincennes. I did not on that or any other night take Mossy Joy, Mr. Perlman, Mr. Heitler and some other men and drive them on the south side and go to a garage at Sangamon and Jackson. I do not know Mickey Frank or Harry Frank, nor have I ever taken Mr. Heitler to Mickey Frank's saloon, the Tile Bar.

Recross-examination.

By Mr. Glass:

I know Mandel Greenberg by sight and have seen him three or four times, I think, in Perlman's saloon three, four or five months ago, which would be about October. I never took him for a ride in my machine.

GEORGE F. QUINN, One of the Defendants Herein.

Direct examination.

By Mr. McCarthy:

My name is George F. Quinn. I live at 4140 Kenmore Avenue. I have been in the saloon business since I was eighteen years old. I am now fifty and am married. I know Mossy Joy and Miller. I do not know Mr. Heitler, except by sight, and had never met him to speak to up to the time of this trial. I have known Mr. Perlman fifteen or sixteen years, having bought glassware from him.
434 I do not know Mr. Greenberg and never met him until I met him in court. I am an Elk. On October 2, 1920, I was in the Elks' Club between noon and one o'clock, having gone there from my home. I met Mr. Truedel and Mr. McCann at the Elks' Club. We stayed there about a half an hour and then went over to Perlman's saloon to get some lunch. They were not serving sandwiches in the club at that time. We got to Perlman's between one and two and had some sandwiches and near beer. Quite a crowd was there, and there was a lot of loud talking about losing money and whiskey and diamonds. Joy was doing most of the talking. I recognized Miller and I think I saw Mr. Ambrosi. I did not talk to Joy or Miller. Mr. Perlman was behind the bar. One of us suggested it would be well to leave and Truedel, McCann and myself went to the Elks' Club. There were quite a few members there. A few minutes later, when I was in the Tap room, Joy and Miller came in. They sat down at a table and started to talk very loud, especially Joy, about losing his diamonds and money and whiskey. Mr. Truedel asked me to go upstairs, to Chief Mooney's office, and tell him to come down; that he had a friend who had lost some diamonds and

find out if he could get them back for him. I went upstairs to Chief Mooney's office. About half an hour later, I came down with an officer and introduced the officer to Joy and walked out in the lobby, outside the Tap room. About ten minutes later, the officer came out and he and I went upstairs. That was the last time I saw Joy until I met him in court. I did not, at any time on the 2nd of October, ask Joy for any money, claiming it as a commission due me for the sale of whiskey, nor did I ever ask him for it, nor did I ever ask anybody for commissions for the sale of liquor, nor did anybody owe me money for the same. I did not at any time, either before the 1st of October or on Saturday before I met Joy and Miller, know that there was to be shipped and delivered to Chicago a thousand cases of Grand Dad liquor, nor did I at any time before or on October 1st conspire, confederate or combine with anyone to buy or to get a purchaser for any liquor.

435 Cross-examination.

By Mr. Glass:

My saloon is the northeast corner of Van Buren and Halsted. I have had it six years. About ten years ago, I had a saloon at Grand Avenue and Curtis where I was for twelve or thirteen years. Before that, I had had a saloon at Whipple and North Avenue, which I had for two years. Before that, I was tending bar. I had never met Mr. Heitler and did not know him. I did not see Mr. Heitler on October 2nd in Perlman's saloon and believe I should have known him if he had been there, as he had been pointed out to me one night in the Elks' Club. Quite a crowd was there and he might have been there without my seeing him. I never saw Mr. Greenberg in Perlman's saloon. I generally stop in Perlman's for a sandwich and a glass of beer when I go to the Elks' Club, once or twice a week. Sometimes I go in alone and sometimes with a friend. I cannot say positively with whom I went in there at other times during that week. On October 2nd, I went to the Elks' Club and met Truedel and McCann there, but not by appointment. I do not remember being in Perlman's saloon before with Truedel and McCann. We were in there between one and two o'clock. I heard Joy talking about losing whiskey, money and diamonds. I did not hear Miller do any talking, nor did I recognize anyone in the crowd except those whom I have mentioned. I did not see any money there that day nor do I remember any talk about getting any money back. We were at one end of the bar and I looked up and saw that Joy was talking, but I could not say to whom he was talking. Joy and Miller were still there when Truedel, McCann and I went to the Elks' Club Then Joy and Miller came to the Elks' Club and when they came in, I was at the bar. Truedel and McCann were with me in the barroom and we then went back in the Tap room, where Joy and Miller were sitting at a table. I sat down at the table with Joy and Miller and seven or eight others of whom I recognized a couple, but do not recall their names, nor have I seen them since. They were talking

among themselves, but Joy did most of the talking about
436 losing diamonds and whiskey. I sat there listening, but did not say anything. Then Mr. Truedel told me to go upstairs. When I came down with the officer, Joy was still sitting there at the table, McCann was sitting at another table, I think, talking to another gentleman and Truedel was sitting back from the table. I left and when I came back again, Truedel was just coming out of the bar room and said he had gotten a nice slap in the face since I had been there. I did not see Joy there then. I had not had any talk about any commissions on whiskey, nor did I hear any talk about $600 coming to Truedel, McCann and myself, nor did Joy tell me to stay away, that he would fix with Heitler and I would get my money, nor did I hear anything of that kind. I do not remember being in Perlman's saloon with Truedel and McCann before this, but I might have been. I have known Truedel by sight for five or six years and have known him to speak to about fifteen months. I know what his business is but never worked with him. I knew McCann. They were in the cigar business. McCann is located in the loop and I am on the west side. I have met him sometimes in the Elks' Club.

Cross-examination.

By Mr. Kirkland:

My attention was called to Mr. Heitler at the Elks' Club on a Thursday night when he was at dinner with Perlman, between six and seven.

Further cross-examination.

By Mr. Glass:

I am a member of the firm of Kelly & Quinn. There is a temporary injunction pending against Kelly and George Orn, 341 South Halsted Street, which is my place of business, but there is nothing pending against me personally.

WILLIAM J. TRUEDEL, One of the Defendants Herein.

Direct examination.

By Mr. McCarthy:

My name is William J. Truedel. I live at 4164 Winthrop Avenue. I am not now and have not been employed since November 30th,
shortly after I was indicted. Prior to that, I had been for
437 seven or eight months a paint inspector for the Board of Local Improvements for the City of Chicago. I was employed by Mr. Righeimer for twenty-one or two years. During that time, Mr. Righeimer was in the saloon business in the old Trude Building, then at 118 Randolph and then in the City Hall Square Building. His business was then turned over to Mr. Harding, who

now conducts a coffee shop. I know Mr. McCann and Mr. Quinn. I have known Mossy Joy three or four years and John Miller, seventeen or eighteen years, but never had any trouble that I know of with either of them. I am a married man and an Elk. On Saturday afternoon, October 2nd, I was in the Elks Club where I met Mr. Quinn, but not by appointment. They were not serving sandwiches in the Tap room on October 2nd. Between one-thirty and two, we were in Perlman's. We had met Mr. McCann on Washington Street and invited him to come with us. I have known Mr. Perlman four or five years and used to buy glassware for Righeimer's from him. He was standing behind the bar. I saw Miller, Joy and Ambrosi there with twelve or fifteen or twenty other people. I did not know Ambrosi at the time. I had a sandwich and a glass of near beer. I heard a lot of talk about money, diamonds and whiskey among a lot of people at the other end of the bar. Mr. Joy was talking, but I did not see to whom he was talking. We were there about five minutes and somebody suggested we get out of there, so Quinn, McCann and I went to the Elks' Club. Within three or four minutes Joy and Miller came in. I was sitting at a table and, being very well acquainted with both the gentlemen, they sat down with me and told me that they had lost whiskey, money and diamonds. They were hollering very much about it and I said that I was very well acquainted in the police department. Mr. Mooney has a room up in the Elks' Club and I suggested to Mr. Quinn that he go up and ask Mr. Mooney to come down. Sgt. Shea came down instead of Mr. Mooney. There was so much noise and talk about whiskey and diamonds and about the police department that Sgt. Shea refused to hear any more and walked away. After the officer left, I
438 told Joy that he must be foolish if he could not help himself out in trying to get his own stuff back. He then slapped me in the face hard enough to put me on the floor. We were in the bar room when Joy slapped me. I did not ask Joy or Miller for any money or claim any commissions from them, nor did I say in Joy or Miller's presence that I was entitled to any commissions from either of them or from anybody else, nor did I at any time ask for any commissions; nor did I know at any time about the delivery of a carload of Grand Dad liquor to Chicago for distribution on October 1st, nor did I sell or purchase any of the Grand Dad liquor which was delivered on October 1st, nor did I have any commissions coming from anybody. I am in this case simply because I am an Elk and happened to be in the group when Mossy Joy was there talking.

Cross-examination.

By Mr. Glass:

I have known Perlman four or five years. I was in Perlman's place about two weeks before October 2, 1920. I don't remember who went in with me. I saw Mr. Perlman there, but do not remember who else I saw. I could not tell when I was in there before that. I do not go there very often. I met Quinn at the Elks' Club,

but did not meet McCann there. Quinn and I met McCann on Washington Street and invited him there. We were together during the three or four or five minutes we were in Perlman's. I know Joy, Miller and Perlman, but do not know Greenberg. I know Heitler by sight and believe I saw him in Perlman's. When I went for the police officer in the Elks' Club, it was to try to help Mossy Joy get back his stuff. I sat at the table with Joy and Miller in the Elks' Club about twenty or twenty five minutes. Mr. Shea was also at the table, together with a man whom I did not know at that time, but who I have subsequently learned was Merle. Neither Quinn nor McCann were sitting at the table, but were standing
439 around. I was sitting at a table with Mr. Quinn and Mr. McCann when Joy and Miller came in. Mr. Merle came in by himself. I never saw Merle at Perlman's. I do not know Merle, but was told the man was he. I was in the Taproom almost all the afternoon. Joy left after he had hit me and I do not remember whether or not he was in and out the last of the afternoon. I stayed around until six or seven o'clock and Joy and Miller left between three and four. I do not know when Merle left. The first place in the Elks' Club that I saw Mr. McCann was the Taproom; he had come in with me. He went into the barroom before Joy left the table. They were talking about two truckloads of whiskey and money and diamonds that had been stolen. They did not say who had taken it nor did I hear the name of either Perlman, Heitler or Greenberg mentioned. They said they were going to get the money back from the police department. Joy claimed he knew who was responsible. I sent Mr. Quinn up for Lieut. Mooney, but he returned with Sgt. Shea. I did not tell him anything about the story, but told Joy to tell him. I complained to those around when Joy slapped me, to McCann, Quinn and Mr. Nordorf. Miller was not there at the time and I did not go and tell Miller. I furnished both Mr. Miller and Mr. Joy with guest cards for the Elks' Club and thought they were friends of mine.

Redirect examination.

By Mr. McCarthy:

I was with Quinn at the Elks' Club the Thursday night, before, between six thirty and seven and saw Mr. Perlman at dinner with a gentleman who I afterwards learned was Mr. Heitler.

JOSEPH TOOMEY.

Direct examination.

By Mr. McCarthy:

My name is Joseph Toomey. I live at 6341 Wayne. I know Messrs. Truedel, Quinn and McCann. I was employed at the Elks' Club and had charge of the bar and the Taproom. I remember

what occurred on the 2nd of October, 1920. In the after-
440 noon, Mossy Joy and Johnnie Miller came in and told about getting stuck up and losing his diamonds. They went into the Taproom, sat down at a table and were talking for some time. They got up from the table, went to the other side of the room, were still talking, and I heard Mossy say to Frank McCann, "Get out of here. I hit you once before on Randolph Street and I knocked you out for half an hour, and if you don't get out of here I will hit you again and kill you." Then they walked toward the bar room and Billie Truedel said to him, "Don't be making so much noise here, you ain't a member." Mossy punched him in the face and knocked him up against the table and Johnnie Miller picked him up. Then Mossy said, "Come on, get out of here before I kill somebody." Then he and Johnnie Miller walked out.

Cross examination.

By Mr. Glass:

Frank McCann, John Miller, Billy Truedel, George Quinn and quite a few other members were there. I don't know what other members were there just at that time, because they were in and out all of the time. I did not hear anything said before the statement by Joy to McCann to get out, that he had hit him once before, but I heard that because he hollered it at the time. I do not know what they were arguing about. They were there about an hour. The men I have mentioned were first in the bar and then went out and sat at a table. I do not know Merle, nor could I say whether or not he was there that afternoon. I did not pay particular attention to anyone else. I know the men I have mentioned personally. I have not talked to anybody about this, but just talked with Billy Truedel the other night when he asked about the incident and I remembered it. My usual hours at the Elks' Club are from eleven until eleven or twelve, depending upon when the members left. I fix this time as October 2nd because it was on Saturday afternoon and I remember the Elks had a stag on September 28th, which was the Tuesday before. I was not told by anyone that this occurred on October 2nd.

441 HARRY COHEN.

Direct examination.

By Mr. Symmes:

My name is Harry Cohen. I live at 1225 South Peoria Street, where I work for my father in the tailoring supply business. I entered the army in the middle of 1917, holding the rank of First Lieutenant and was gassed in France. I met Michael Heitler some time last fall, I believe in the early part of October. Two friends of mine, Joseph Hoffman and Louis Feldman, were with me at the time. Hoffman lives somewhere on Taylor Street. I don't know the exact address. Louis Feldman lives quite a ways from my

neighborhood. I have known them for fifteen years or more. I met Mr. Heitler in Perlman's saloon. That night, my friends played pinnochle with Mr. Heitler, but I did not play. The game was broken up by some excitement. A couple of gentlemen came in, approached Mr. Perlman, who was tending bar, and one of them said, "I was just held up for some booze." He then asked "Where is Mike?" Mr. Perlman pointed over to one of the settees and said "There is Mike, playing cards." Then the man said "I want my booze back," and made a pass at him and was going to punch him, but did not. Mr. Heitler then got up and said that he was mistaken, that he had been playing cards there for the last three or four hours. In the meantime, Mr. Perlman came from behind the bar and said "Look here, Mossy, they have been sitting there playing cards for a long time." I do not remember the conversation word for word. This was between eleven and twelve in the evening. My friends and I had come in between seven and eight and Mr. Heitler had been there from the time we entered, playing pinochle. I was not playing, but keeping score. I went home in Mr. Heitler's machine.

Cross-examination.

By Mr. Glass:

I work for my father in the tailoring supply business. I have been employed for about a year with the American Railway
442 Express Company. I had never been in Perlman's saloon before that time, nor did I know Mr. Perlman or Mr. Heitler. We were going to go to a show, but stopped at the La Salle Garage so Mr. Feldman could see a friend. After leaving the garage and while walking down Washington Street, Feldman, having recognized Mr. Heitler's car, said he wanted to see him, so we went into Perlman's. Mr. Feldman introduced me to Mr. Heitler and after talking a while, Mr. Heitler suggested a game of cards and they sat down and played pinochle. That is the first time I had met either Mr. Perlman or Mr. Heitler. I have occasionally been out with Mr. Feldman and Mr. Hoffman before and watched them play, usually at Goldman's restaurant at 12th and Halsted. There were quite a few people there in Perlman's saloon, but I did not see anyone I knew and I was not introduced to anyone except Mr. Perlman and Mr. Heitler. When the two men came in, they first talked to Mr. Perlman and then I heard the remark about being held up for a lot of booze and some diamonds. Then he said "Where is Mike?" and Mr. Perlman pointed to Mr. Heitler in one of the settees. I am not sure of the exact time, but it was between eleven and twelve o'clock. Mr. Heitler got up and said that they were mistaken and that he had been sitting and playing cards for the last three or four hours. The man said to Heitler, "You will pay dear for it if I don't get my booze back and those diamonds." Mr. Perlman called him Mossy, but I did not hear any other name mentioned. When my friend said "Why there is Mike's car", I did not know whom he meant by "Mike." I talked about this case a couple of nights later with Mr. Heitler outside of Goldman's place at 12th and

Halsted. He told me he was in trouble and night have to ask me to appear at the Englewood Station as a witness. I saw him the morning after that talk at the same place when he came with his machine and took us to the Englewood Station. The case was dismissed and I did not appear as a witness. About two months after the Englewood case, I talked with Mr. Symmes and Mr. Kirkland. I have no recollection as to whether or not the night of which I have been speaking was October 1st, but I believe it was in the early part of October.

443 Redirect examination.

By Mr. Symmes:

I am not related to Benjamin Cohen, the attorney.

Whereupon the defendants rested their case.

And thereupon the United States, to maintain further the issues on its part, introduced the following evidence in rebuttal, to-wit:

PHILLIP GARBER.

Direct examination.

By Mr. Glass:

My name is Phillip Garber. I live at 4856 Vincennes. I am in the cigar and confectionery business at 329 East 51st Street, which is across the street from the New Park Theatre. I have been in that business, at that location, for ten years. I have known Isadore Stone about a year. He is in the candy business. I am one of his regular customers. I have no recollection of seeing Mr. Stone at my store on 51st Street on the 1st of October, 1920. He does not call on me personally for trade.

Cross-examination.

By Mr. Kirkland:

My place of business is 329 East 51st Street. The kind of business is cigars, confectionery and billiards. I handle candies, have known Stone about a year, do not know anything against him and am one of his customers. I do not remember what day of the week October 1st was on. I have no recollection of seeing him on October 1st and do not know whether he was there or not. He might have been there on October 1st and I not know it.

M. L. NEBOZATKO.

Direct examination.

By Mr. Glass:

My name is M. L. Nebozatko. I live at 3704 West 22nd Street, Chicago, Illinois. I am a paying teller in the 26th Street State Bank. In October, 1920, I was paying teller in the Casper State Bank at 1900 Blue Island Avenue.

444 Q. Now, have you any recollection of a check of W. F. Merle, Jr., payable to J. H. Miller, for the sum of $4,940, having payment stopped thereon?

Mr. Kirkland: That is objected to as immaterial on behalf of my client, or our clients, rather, and as part of their case in chief.

The Court: He may answer.

(To which ruling of the court the defendants by their counsel then and there duly excepted.)

A. Yes.

If I am not mistaken, it was the gentleman in the corner (indicating the defendant Heitler) who presented the check for certification. This check was presented at the bank about 9:10 A. M. I refused certification and he took the check away with him.

Cross-examination.

By Mr. Kirkland:

I know this gentleman (indicating Mr. Walker). He did not point out Mr. Heitler to me today, but on Monday he asked me whether I knew that gentleman (indicating the defendant Heitler). I had come to this floor in this building, after having been to the District Attorney's office, and was standing in the hall with Mr. Walker when the gentleman to whom I have pointed, passed by and Mr. Walker asked me if I knew him. Mr. Walker did not bring me into the room and ask me to look around and see if I could pick out the man. This man was not pointed out to me again today. In the fall of 1920, I was paying teller with the Casper State Bank, 1900 Blue Island Avenue, Chicago, Illinois. The bank does a large business and a great number of people come in there. The day when the check was presented was, as near as I can fix it, the first part of October, the second, third or fourth—I do not even remember what day of the week it was. I do not remember how many checks were presented at my window on the 2nd of October for certification. On the 2nd of October, about three or four hundred people came to my window and the same number on the
445 3rd of October and every other day. The man who presented the check for certification wore a hat and overcoat. This

was in the morning about ten minutes after nine. I *stand* in the cage, but no one else was in there with me at the time. I was first spoken to about being a witness in this case about a week ago. From the time the check was presented until a week ago I had not seen the man who presented it, nor had I thought anything about it, nor did I know I was going to be called to identify the man who came there that morning. Mr. Merle has an account there and I may know him, but I do not know. I do not remember to whom the check was payable. I do not remember if I have ever seen Merle. There are about two or three thousand checking accounts in the bank. I remember the drawer of the check was Merle. I know a majority of the depositors. I do not know John Miller or Maurice John Joy. Mr. Walker did not point out to me, when I was down there last Monday, a man named Maurice John Joy or one named John Miller or one named Fitzpatrick or one named Frank. The only man to whom my attention was called was the defendant Heitler. I was standing out in the hallway with Mr. Walker and he said to me "See whether you can see the man that presented that check in front of your window," and then the defendant Heitler came along. This was about nine thirty. He had on a soft black hat. I think he had on the same hat when he presented the check. The man at my window did not wear glasses or spectacles, nor did he have a mustache. He was there about five or ten minutes. I was not standing there all the time, but had to go back and look up the bonds of Mr. Merle. He was at the window, while I was there, about a minute. We were just starting to get busy and I didn't have any time to waste that morning. I do not know who the next man was who came to that window that morning or whether or not he wore glasses or whether he had on a stiff or soft hat, nor do I know anything about the second man who followed the man who wanted the check certified. I think the defendant Heitler is the man, but I am not absolutely sure. As paying teller, I have a great many
446 people come to the window to have checks certified all day. About ten or fifteen at least. I think that day there were that many. I refused to certify this check.

WILLIAM MOORE.

Direct examination.

By Mr. Glass:

My name is William Moore. I live at 4144 Sheridan Road, in the Ceville Apartments. I am an oil operator. I have been in Chicago at least fourteen or sixteen years. I know where Perlman's saloon is and since August have been in the habit of getting sandwiches and lunches there. I know Perlman, Greenberg, Joy and Miller and I know Heitler by sight. I remember being in Perlman's saloon the latter part of September.

Q. Did you have any conversation with anybody—well, who was there at that time?

Mr. Kirkland: This I object to as part of their case in chief.
Mr. Glass: No, I am going to rebut their evidence.
Mr. Kirkland: And it has not been shown that he was not in the jurisdiction of the court when they were putting in their case in chief.
The Court: Overruled.
Mr. Glass: I think the court said "overruled?"
The Court: Overruled, yes.

(To which ruling of the court the defendants, and each of them, by their respective counsel, then and there duly excepted.)

447 Mr. Glass: A little louder, Mr. Moore.

A. Answer that question?
Q. Yes.
A. Read the question.

(Question read.)

A. Perlman and Greenberg.
Q. What time of day was it?
A. Around about noon.
Q. Now, what did they say to you?

Mr. Kirkland: May I make the same objection for the same reason, and that applies to this line of testimony?
The Court: Yes, and objection overruled.

(To which ruling of the court the defendants, and each of them, by their respective counsel, then and there duly excepted.)

A. They were talking about whiskey.

Mr. Perlman and Mr. Greenberg said that they had a carload of stuff coming in from the south. They said "Do you know anybody that wants to buy any?" I replied that I had known Joy and Miller slightly for the last week and that they were looking for some. I was told to go to see them at the Elks' Club and tell them that they had some stuff. The price was $130 and I was to put on a couple of dollars for myself. I went over there and found those men and referred them to these parties that had some stuff for sale and they said that they would go over there shortly. The next day, I went back about eleven o'clock and asked Mr. Perlman if they had done anything and he replied that they were going to take a hundred cases or so. Mr. Greenberg was there, in front of the bar. I came back the next day, Friday, about the same time to get my lunch and saw Perlman and Greenberg. They said there was $2.00 a case in it for me. It was to be delivered that evening. The next day, Saturday, about ten or ten thirty, I called up on the
448 phone. Mr. Greenberg came to the phone and I recognized his voice. I asked him what had been done and he said "Plenty. They took the stuff, held them up." He then rang off.

I never went in Perlman's saloon after that. About a week ago I saw Mr. Perlman and Mr. Greenberg at Clark and Adams.

Q. Did you have any talk with them?

A. I said "Hello" to him, and he said "Hello". He said, "I understand you are a witness——"

Mr. Kirkland: I submit this is not a part of the rebuttal.

Mr. Glass: It is a conversation.

Mr. Kirkland: It is part of their case in chief.

Mr. Glass: He said he did not meet him, if the court please.

Mr. Kirkland: No, Perlman said you met him and he wasn't asked about any conversation with Perlman——

The Court: I think a different rule applies with reference to parties than it does to witnesses. If any admission was made by a party, it is relevant at any time, regardless of the foundation. As far as a witness is concerned, you cannot impeach unless the foundation is laid.

Mr. Kirkland: I agree with the court on that proposition, but I want to make the point which I made at the start of this testimony, that it is not rebuttal, it is a part of their case in chief, opening up a proposition that will necessitate our calling witnesses.

The Court: He may answer.

(To which ruling of the court, the defendants, and each of them, by their respective counsel, then and there duly excepted.)

A. He said, "I understood you were a witness for the Government." And I said "That is news to me." Yes, that was what they understood, they said.

449 He asked me where I lived and I replied in the same hotel where I formerly lived and I walked across the street in order not to get into any further conversation. I know Mr. Heitler to see him. I saw Heitler in Perlman's saloon on the day I have mentioned, but had no talk with him, as he was usually at the other end of the bar, but I saw them have conversations with him. I saw some money there on Friday in the possession of Heitler, but I did not see where the money came from. I did not see Joy there that day.

Cross-examination.

By Mr. Kirkland:

I have been in the oil business. The only time I ever took commissions on liquor sales was the time I have mentioned. I met Mossy Joy a week prior to the time in Perlman's saloon. I first met Perlman around the middle of August, by going in his saloon and eating. I met Perlman about a week ago, about noon, on Clark and Adams. He said "Hello" to me, but did not say that he had been looking for me or that he wanted me as a witness in this case, nor did he ask me if I remembered coming in his saloon in the summer of 1920 and talking to him about a man named Miller having

liquor. He did not tell me that Mossy Joy had testified that I had taken him (Joy) and Miller to Perlman's saloon and he did not tell me he wanted me to testify concernng that. I did not say to him that I had just gotten out of Blackwell's Island and that I could not be a witness; that I had a record and nobody would believe me. I was not in Blackwell's Island, nor have I ever been convicted of a crime. I carry on my business in Chicago. Two years ago I had an office in the Otis Building. Since then, I have carried on the oil business in Louisiana, but have spent most of the last two years in Chicago. I was in the machinery manufacturing business at one time. I gave up my office in the Otis Build-
450 ing because I sold my business, about two years ago. Since then, I have carried on the oil operating business in Room 1010 Security Building, where I have part of an office with Mr. Lynn, who is a "mercantile man." I never sold or tried to sell oil stocks. I have my personal capital invested in the oil business. I drill for wells. The last well I drilled was last winter at Homer, Louisiana. I do not form a corporation and then sell the stock. I have not done any oil operating since then, but I have some leases and own some property. I first knew that I was going to be a witness last Saturday night when Mr. Walker came to my home to see me. Mossy Joy was not with him, nor have I seen Mossy Joy or talked to him since the occasion of which I have spoken. I met Miller in the government offices and talked with him a little, but Joy was not with him. I have been in Chicago all of the last two or three months and was here the 15th of February, 1921, and lived in the Seville Apartments on Sheridan Road. I have not seen Mossy Joy since the 15th of February, nor had I seen him before Mr. Walker visited me. Mr. Walker did not tell me what Mossy Joy testified to. My family consists of my wife. I made my living out of oil operating and am now selling the bonds of the Missoula Placer Mining Company of Missoula, Montana, a Delaware corporation, incorporated for half a million. These bonds are not yet listed on any stock exchange. I have some interest in the company. I had the properties and got $100,000 of the stock for the properties, but have never sold any of it.

Q. They are working the mine, are they working it?
A. It has been worked.

Before the day when Perlman spoke to me about whiskey, I had met him perhaps half a dozen times in his saloon. I had met Greenberg also in the saloon and had seen Heitler, but had never met him. I never saw Joy or Miller in there. The latter part of September, I went in there, but not by appointment, and saw Perlman and Greenberg. Heitler was at the end of the bar. I met an oil man in there. This was the 29th of September. No one was
451 with me when I went in. Perlman did the talking. Heitler did not say anything to me, but Greenberg did. I told them I knew Joy slightly. From overhearing a conversation prior to September 29th, between Joy and Miller, I had reason to believe that Joy and Miller would purchase liquor. The next day, Sep-

tember 30th, I went back to Perlman's. No one was with me. On the 29th, I met Joy and Miller after I had been in Perlman's saloon and did not go with them to the saloon. I did not go there with Joy and Miller on the 1st of October or at any time. I was not in there with Joy and Miller after the 2nd of October. While I was talking to Perlman and Greenberg on September 29, a great many people were around. I went in there on September 30th about noon. The place was crowded. Greenberg was there. No one else was there that I knew. They told me on September 30th that they had transacted their business. They did not tell me they had been paid or that they had gotten their money. I was in there on Friday, about eleven thirty, and they said that they "had been fixed up." I did not ask for my commission, nor did they offer it to me. I was waiting for delivery, I presume. Nothing had been said about my waiting for my commission until delivery was made, but I was to get it when they got their money. They told me on Friday "they had been fixed up," but I did not ask for my commission. I had never talked with Greenberg over the telephone before Saturday. On Friday, October 1st, I met Greenberg in Perlman's saloon about eleven o'clock. I was there about ten or fifteen minutes and left about twelve and he was there when I left. Heitler did not speak to me at any time on the three occasions. On Wednesday, September 29th, I told Perlman and Greenberg that Joy and Miller would buy liquor. I did not know Joy or Miller when they were in the saloon business, nor did I in September, 1920, know anything about their business.

EDWARD TODD.

Direct examination.

By Mr. Kelly:

My name is Edward Todd. I live at 3301 Fulton Street. I now work for the city of Chicago. Around October 1st, 1920, I
452 was running a soft drink parlor.

Q. Soft drink parlor. Did you, around the 1st of October, 1920, receive a check from Michael Heitler and Nathaniel Perlman?

A. No, sir.

Mr. Kirkland: I object, as leading and suggestive.

A. No, sir.

Mr. Kirkland: I object, on the ground it is part of their case in chief, and there is no showing that they could not have subpœnaed this man while they were putting in their case.

The Court: The answer may stand.

(To which ruling of the court, the defendants, and each of them, by their respective counsel, then and there duly excepted.)

I do not know that I would know Mr. Heitler if I saw him. I met a man by the name of Perlman about this time, but do not

know whether or not it is the man in this case. Mossy Joy made an appointment to go to my office that morning and told me there was a party wanted to meet me and straighten up matters. I went there and was met by a man named Perlman and a fellow that was introduced to me as Mike. They asked me what I had lost and I told them I was out $2,100 "on the transaction that Joy and I had," that is, on the liquor I had purchased from him. I had no conversation with Perlman, but the man named Mike said he had told Joy he would take care of me and offered me a check, which I refused.

453 I cannot say how much the check was for, but he said it was for $1,200. I said that I had dealt with Joy and they said they would see that I was taken care of. I refused the check as I do not believe in accepting a private check on any amount of money. I said I wanted cash. When I got to my place of business that night I was given an envelope addressed to me containing $1,200 in cash. I called up Joy and told him and he said he would see that I got the rest, and the next day I got $750.

Cross-examination.

By Mr. Kirkland:

I have known Mossy Joy intimately for fifteen years. I was introduced to a man named Mike, but did not know him before and had never had any dealings with him. I had had dealings with a man named Perlman who used to be salesman for a glassware house. I have had dealings with Joy. I saw a piece of paper, but I do not know if it was a check, nor do I know whether it was signed by Joy or Mickey Frank or John Miller. At that time, I was running a soft drink parlor at 42nd and Madison. I had had some whiskey dealings with Joy a few weeks prior to that time. I met him at my place of business and he told me he had some liquor, but did not say he had a carload of whiskey or liquor coming. He asked me how much I could handle and did not put any limit on what I could take. No one was with him at that time. I have known John Miller by sight for a while, but am not personally acquainted with him. On the occasion two or three weeks before he called me up, he did not mention the kind of whiskey, nor the shape it would come in, case or bulk, nor did he mention Grand Dad. The price was $140 a case. He had called me up on Wednesday and we agreed on the price at that time. Before this Wednesday, I had bought whiskey from him a couple of times. I do not know whether or not he had a partner in those deals. The last time I saw Mossy Joy was a couple of weeks ago, when I happened to meet him on the street. I have not seen Joy since. Well, yes, I have too seen him, in the District Attorney's office, here in the Federal Building. I paid Mossy Joy $2,100

454 for this liquor. Mossy Joy told me to go to Chicago and Paulina Avenue, where I was to meet him at a pool room. I do not know whose pool room it was. I stood there at the door and then the man named Perlman came. Joy was not there. I was with Joy in the District Attorney's office the other night about three quarters

of an hour or an hour. I first knew I was to be a witness in this case when I was subpœnaed Tuesday evening. I left home at seven o'clock in the evening to answer it. Joy did not call for me. Before I talked to Mossy Joy, I denied knowing anything about this whiskey transaction. I do not know whether you would call my remarks to Mossy Joy in Mr. Kelley's office profanity or calling him a lot of names. It was after I talked with Mossy Joy that I said that I met the men called Perlman and Mike in the pool room at Chicago Avenue. On Tuesday night, all that Mossy Joy said to me about being indicted was, that I was lucky that I had been left out as long as I was; that if my name had been mentioned I would have been indicted, but he had not mentioned my name. Neither he nor anyone else said that if I did not tell what I knew I would be indicted. He also said that it had come to a point where he had to protect himself by bringing me in and that he was the one who had brought me in. Miller was not there. I do not know how long I persisted that I did not know anything about this. Joy did not tell me that unless I told, I would get into trouble over this liquor deal or that he would tell of other deals I had been in, nor did he say he had been promised immunity. I did not ask anyone if I would be prosecuted. I have not left Chicago since the 15th of February. Joy did not say what he meant by protecting himself, nor did he say anything about Jews or slamming the Jews. After I had come to this pool room, I refused what they said was a check. I do not know Greenberg or Mickey Frank or Fitzpatrick. I had this talk with the two men on the outside of the pool room, sometime between one and two. I do not remember the day of the week or month. The two
455 men came up in a machine, which I think was a touring car. I do not know which one was driving, nor did I see if there was a driver in the car. I had not seen the man Mike before that, nor have I had him pointed out to me since, nor did Joy describe him to me. He was about five feet six or seven. I do not know whether he had on a stiff or a soft hat, or whether or not he had on an overcoat. He was about forty. The other man was a few inches taller and weighed about a hundred and seventy-five or eighty. I do not remember whether he had on light or dark clothes. After I had a talk with Joy, I read about a whiskey robbery. I think it was the next day after reading about the robbery that Joy called me up and told me to meet him and the two men.

JOHN CHRISTIE.

Direct examination.

By Mr. Glass:

My name is John Christie. I live at 2358 Indiana Avenue, Chicago, Illinois. In the early part of October and the latter part of September, 1920, I was night watchman for the Auto Car Sales and Service Corporation, at whose garage the Mid City Express Company kept their trucks. The garage is on the northeast corner of Sanga

mon and Jackson Boulevard. On the night of October 1st, 1920, about two or three o'clock in the morning, some men came to the garage and rang the bell at the gate. I went to the door about twenty feet north of the gate.

Q. What did they say to you?

A. They said——

Mr. Kirkland: I want to make the same objection, that this is a part of their case in chief.

Mr. Glass: I want to get my rebuttal in.

The Court: Sustained—or, overruled.

(To which ruling of the court, the defendants, and each
456 of them, by their respective counsel, then and there duly excepted.)

Mr. Glass: All right.

Q. What was said?

A. He said, "Any Mid City express wagons in here?" and I said "Yes;" he says "Did two come in?" and I says "No," not since I come on, seven o'clock;" he says "Are there any in here?" and I says "Yes," and they come inside. First of all, when I went to the door I had a gun that was supplied to me by the company and thinking it was a holdup, I pulled the gun on them; one man was there with his hand in his overcoat pocket, and the fellow standing alongside said "Show him your star, George," and he showed me the star, and I says "All right, come in," and the fellow that had the gun told me, he says "You are a damned fool," he says, "You could be bumped off that way, pulling a gun on a fellow that way."

There were four or five men. I let them in and showed them that the cars they were looking for were not in. Then we went back to the garage office. One man was hollering and talking about losing some money, diamonds and stuff. The officer told me to pay no attention to him as he had a few drinks in him. The officer was this man (indicating the defendant Hans). I know Joy and saw him there. Another man with gray hair, Mike the Pike, was there. Joy was the one who lost his money and diamonds. They were there about ten or twelve minutes and went away in a car.

Cross-examination.

By Mr. Kirkland:

The officer had on a soft hat and dark overcoat. He was not in uniform. I recognized the man I said was Mike the Pike by seeing his picture in the paper afterwards. I did not pay any attention to the date and cannot say how long afterwards. I made a report of the matter in the morning. I did not hear the name Joy mentioned at the garage that morning, which was about half past
457 two or three o'clock. I have been in Chicago all of the last two months. I stopped working for this company a few days after Christmas. When I let the men in, one man stayed in the car,

I could see him, but could not recognize him or see what he wore, nor can I tell what kind of a car it was. The officer pulled back his overcoat and coat and I saw the star on his vest. This was a detective sergeant's star, but I did not get the number; I took the men through the garage office out into the garage. I did not at that time think that I would ever be called upon to identify them. I showed them the cars in the garage. There were balls on the points of the star, which was small. After returning to the garage office, I let the men out on the street. The man who was talking about losing money and diamonds did not say he had had a Mid City truck that night, nor did he or any of them say how many trucks the Mid City had out. There was one light in the garage office. I had my searchlight back in the garage, throwing it on the cars. I did not throw it on the faces of any of these men. The man who was talking about losing money did not ask me if a man named Greenwald or a man named Fisher had turned in their cars. I knew Fisher and Greenwald. This was at two or three o'clock on Saturday morning. There is nothing different about my working Saturday from working Wednesday or Monday, except that sometimes I go home earlier and sometimes later. I was always there at three o'clock on Monday morning and was always there at three o'clock on Saturday morning. I know the day because I turned in a verbal report to Mr. Hunter, the Superintendent. I did not tell him I knew I could remember the men, but I told him that they came in a car early in the morning, at half past two, looking for Mid City Express Trucks and one showed a star and told me he was an officer. Mr. Hunt is Superintendent of the Auto Car Sales and Service Station. I could not say how long it was after this that I saw a picture of Mike the Pike. It may have been a week or a month. I did not read what was printed around the picture. The picture had the name under it. I could not say whether the name was Mike the Pike or Mike the Pike Heitler. I did not read anything
458 about Detective Sergeant Hans. I could see the entire face in the picture. I do not think the man in the picture had a hat on. I do not remember what paper it was, or whether it was a morning or afternoon paper. The man who was talking about money and diamonds was a red faced fellow. I saw him in the government attorney's office. When he came and took off his hat I said "There is one of the men." I think that was Wednesday. I have not talked to him, nor has he been to my place of business since. I had not talked to anyone before this man walked in the government attorney's office. Last Monday morning, a man named Potter brought me in the courtroom and stood with me back of the screen, but did not point anyone out. Hans, who was the officer, was sitting here. Mr. Heitler was not sitting in the courtroom, but when I passed through here Mr. Heitler was standing outside of the door, smoking a cigar. I stood there with Mr. Potter while I looked over the room, but he did not tell me anything. When I saw this picture of Heitler in the paper, I did not tell the Superintendent or anyone else that he had been to my garage that night. I read about the whiskey robbery after that. I do not remember seeing the name

Hans in connection with it. I read that some trucks were held up. I knew they were Mid City trucks when they came back. I did not read that they had accused Mike Heitler of holding them up, but I did read something about a policeman being accused. I did not tell anybody that a detective sergeant had been out to the place where I worked. Early Saturday morning I told Hunt, the Superintendent, Barney Bierman and everybody in general in the garage office that a bunch of men had come down in a car that night. Bierman is the day garage man. I did not tell him that I could identify the people who had been there, nor did I ever speak of the matter again. I never talked to anybody about it after that until last Monday in the District Attorney's office. Up to two weeks ago last Monday, I read in the paper about Mike de Pike Heitler and about this whiskey trial, but I did not think of coming down
459 here and telling the government attorneys that Heitler was the man who had come up to my garage. I have been idle since Christmas. I am now living at 2358 Indiana Avenue, but have lived at 128 E. 16th Street, where my landlady was Mrs. Lynn. I am thirty one and single. I worked for the Rock Island railroad. I worked for this garage about seven months. Prior to that I had worked off and on for the Rock Island railroad for about eighteen months. I left in March and went to work for the garage in April. Prior to leaving the Rock Island in March, I had worked for them continuously a little less than thirty days. Prior to working for the Rock Island railroad, I worked for three or four months in the Imperial Hotel, 316 South State Street, where I was porter and handy man. Prior to that, I worked for a man named Bernstein in the New Deming Hotel, Clark and Jackson Boulevard, where I was porter for about two months. In the last two years I have had perhaps twenty or thirty jobs. Besides working in a garage and as a hotel porter, I have worked as a bridgeman, have done motion pictures and have been a sailor. I worked at motion pictures, turning the crank, from 1910 to 1913. On the occasion when these men came to see me, I did not make any written memorandum of the day of the month. I think it was the first because there is a calendar in the office and I general marked off the day and I think I tore the sheet off. I do not remember whether or not there were any days marked off beside the one I have mentioned. There was a fourth man in there that night who was tall, but I could not describe him or what he had on. I did not hear him called by name, nor did he say anything about losing whiskey or diamonds, nor did he take part in any conversation so far as I heard. I looked over this enclosure last Monday pretty thoroughly and stood there with Potter for about five minutes and could not recognize the fourth man. I did not see this man (indicating the defendant Greenberg) at the garage that night. The fourth man was a tall man of that man's (indicating the defendant Perlman's) stature and build, but
460 I would not swear that that was the man. I did not get a look at the fourth man, although he went through the office and into the garage with me and back through the office again. I did not see Miller there that night. From the time the men were

in my place until last Monday, I had not seen anyone of them and I did not know, nor did it occur to me, that I would ever be called upon to identify them. Barney Bierman came in at seven o'clock in the morning and I told him that a bunch of men drove up in a car with a police officer looking for the Mid City Express truck. He asked what they were looking for and I said they were hollering about some whiskey or some diamonds and money being lost. I saw the Superintendent, Hunt, that morning and told him. When Mr. Potter brought me inside the door of the courtroom, all that he said was "Do you see anybody there that you know?"

Redirect examination.

By Mr. Glass:

I was in the army.

And thereupon the United States rested its case in rebuttal.

The defendants thereupon moved the court to grant a continuance until the following morning in order to enable the defendants to investigate the truth of the testimony of the witness Todd and of the witness Christie and to present evidence that the first newspaper story in regard to this shipment of Grand-Dad whiskey appeared in the Chicago Tribune on Sunday, October 3rd, and that it was the appearance of said story in said newspaper which caused the witness Joy and other Government witnesses to be taken to the police station; that no picture of the defendant Heitler appeared in connection with this case except in the Chicago Tribune.

Which said motions so made by the defendants were overruled and denied by the court.

To which ruling of the Court, the defendants, and each of them, by their respective counsel, then and there duly excepted.

461 Whereupon it was stipulated and agreed by and between the respective parties hereto, by their respective counsel, that the first publication which appeared in the public press in regard to this carload shipment of Grand-Dad whiskey, appeared in the Chicago Tribune, Sunday morning, October 3rd, in very large type on the front page.

Whereupon, the defendants, further to maintain the issues in their behalf, introduced the following evidence, to-wit:

MICHAEL HEITLER, One of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

I saw the paying teller from the bank this morning. I do not know the Kasper State Bank at 26th and Blue Island, nor did I go to that bank at nine ten in the morning in the month of October and present a check of Merle's for certification. I saw the witness

Moore. I had met him once in a law office, but never saw him in Perlman's saloon, nor did I on Wednesday, Thursday or Friday, September 29th, 30th and October 1st, see him in there talking to Perlman and Greenberg. I did not go to a pool room at Chicago Avenue and Paulina, or any other pool room, and meet the witness Todd or offer him a check, nor did I ever send him money or leave money in an envelope at his place. The first time I saw the witness Christie was the other day, standing in the hallway, and one of the men he had with him pointed me out and said "This is Heitler." In the last year, I have never left my home as early as nine or ten minutes after nine, but always leave about ten thirty or eleven o'clock.

MANDEL GREENBERG, One of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

The owner of the premises on St. Lawrence Avenue where I lived is Sarah Cohen, but her daugh-er is the agent. The building was sold to a Mrs. Geiger while I lived there. Defendant's Exhibit A of March 4, 1921 is the lease I signed for my apartment on St. Lawrence Avenue and it shows that the lease was entered into
462 on the 30th day of August, 1919 between Sarah Cohen and Mannie Greenberg for the premises known as the second apartment on the second floor of the building known as 4737 St. Lawrence Avenue, in Chicago, used as a private residence, from August 30, 1919 to August 30, 1920.

Whereupon Defendant's Exhibit A of March 4, 1921 was offered and received in evidence and was and is in words and figures as follows, to-wit:

463 DEFENDANT GREENBERG'S EXHIBIT "A" OF MARCH 4, 1921.

Lease of Flat—Steam Heat.

This indenture, Made this 13th day of August, A. D., 1919, By and between Sarah Cohen, party of the first part, and Mannie Greenberg, party of the second part.

Witnesseth, That the party of the first part hereinafter termed the Lessor, does hereby demise and lease unto the party of the second part, hereinafter termed the Lessee, who does hereby rent and take the flat or suit of Rooms known and designated as 2nd AP. on the 2nd floor, of the Building known as No. 4737 St. Lawrence Av., in the City of Chicago in the State of Illinois, to be used as a private residence and for no other purpose from Oct. 1, 1919 to Sept. 30, 1920 at and for the sum of Six Hundred & Thirty and no/100 Dollars, for the said term payable as follows: Fifty-two and 50/100 Dollars, on October 1st 1919 and Fifty-two and 50/100 Dollars, ($52.50) on the First day of each and every succeeding month in

the term, or of any renewal or extension thereof, at the office of Jos. H. Weil, Agt.—4737 St. Lawrence Av. 1st Apt.

(Here follow the conventional provisions regarding furnishing of heat, fixtures, forfeiture, etc.)

In witness whereof, The parties have hereunto set their hands and seals, this day and year first above written.

(Signed)	MANNIE GREENBERG.	[SEAL.]
(Signed)	SARAH COHEN,	[SEAL.]
	By JOS. H. WEIL, *Agt.*	[SEAL.]

464 I saw Moore in the courtroom, but never saw him before in my life. I did not see him in Perlman's saloon on Wednesday or Thursday or Friday, September 29th, 30th and October 1st, nor did I talk to him about whiskey. I was not downtown on Friday and was not called to the telephone in Perlman's saloon on Friday, the 1st day of October, 1920. I at no time telephoned Moore or told him that plenty had happened, that there had been a hold up.

NATHANIEL PERLMAN, One of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

I saw the witness Moore. He is the man who, I testified, came in my saloon in July or August and the same man that I had seen in a lawyer's office prior thereto and the same man that told me I could find Miller in Adolph George's. I met him one day last week at Clark and Adams and told him I wanted to see him. He asked what for and I told him that I wanted him as a witness in regard to the time he was in my place last July or August and told me that he had a friend by the name of Johnny Miller who had a carload of whiskey; that I could find Miller at Adolph George's and that I should be sure to tell Miller that Moore had sent me to him. He said that he remembered. Then I told him that Mossy Joy on the stand had said that I sent him (Moore) out to sell whiskey for me that I had a carload of whiskey. He said that that was a lie, that I had never sent him out to sell any whiskey. He said that he would not go on the witness stand because he was an ex-convict and had served time in Blackwell's Island in New York. I asked him where I could find him and he said that I couldn't find him, that nobody knew where he was. Greenberg was not with me. I saw Todd on the witness stand. I do not know where his saloon or soft drink parlor is, nor did I drive with Heitler to a pool room on the north side or any place in Chicago and offer Todd a check.

465 MICHAEL HEITLER (Recalled).

Direct examination.

By Mr. Kirkland:

I saw the witness Christie. I did not go to the garage of the Auto Car Sales and Service Company at Jackson Boulevard and Sangamon on the night or early morning of October 1st with Detective Sergeant Hans or with Mossy Joy and some other man, nor did I ever see this man Christie before I saw him in the hallway last Monday.

GEORGE HANS, One of the Defendants Herein.

Direct examination.

By Mr. Kirkland:

I saw the witness Christie. Last Monday, I was sitting in a chair (indicating about ten feet from the doorway of the little door coming into the enclosure in the courtroom and probably twenty five feet from the entrance to the courtroom). Mr. Potter and Christie came in there and stood back of the hat rack and then Mr. Potter whispered something to Mr. Christie who then looked around the courtroom. Christie then whispered something to Mr. Potter and Mr. Potter whispered back. Soon after, they both left. I never wear my star on my vest. I wore the suit I have on in October and there are no pin marks on the vest I have on, nor on my other vests and I have had some of them for four or five years. I never saw Christie before he came in here with Mr. Potter, nor did I ever say to him that he could get bumped off for pulling a gun. I was not on Saturday, October 2nd, between two and three in the morning, at the garage at Sangamon and Jackson, nor have I ever been in that garage.

BARNEY BIERMAN.

Direct examination.

By Mr. Kirkland:

My name is Barney Bierman. I live at 617 Lowe Avenue. I work for the Auto Car Sales and Service Company, at 953
466 West Jackson Boulevard, Jackson and Sangamon. I was the day man in October, 1920, and Christie was night man. I came to work at seven o'clock. I do not remember that he ever told me on any morning in October that the night before or early in the morning, at two or three o'clock, a police officer or a policeman and three other men had come to see if the Mid City trucks were there.

Whereupon, the defendants, by their respective counsel, moved the Court to grant a continuance until the next morning, in order to

enable them to investigate the truth of the testimony given by the witness Todd.

Which motions were overruled and denied by the court.

To which ruling of the court in not holding said case open until the following day for the defendants to produce further evidence, the defendants, and each of them, by their counsel then and there duly excepted.

Which was all the evidence which was offered or received on the trial of this cause.

467 Thereupon, at the close of all the evidence in the case, on the motion of the Attorney for the United States, the Court dismissed the defendant Gindich from the case.

And thereupon, at the close of all the evidence in the case, the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, by their respective counsel, each severally moved the Court to direct the jury to find him not guilty, the motion of the defendant George F. Quinn being an oral motion and the motions of the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg and Frank McCann being written motions, said written motions being in words and figures as follows, to-wit:

Now comes Michael Heitler, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Michael Heitler, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of any such conspiracy or combina-
468 tion as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trustworthy evidence but is tainted with self-contradictory statements or expressed malice or both.

8. The evidence adduced fails to prove that the said defendant, at any time, was a party, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell or possess for sale intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended, or conspired to possess for sale intoxicating liquor, to wit, whiskey, at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which had as an object the purchasing of whiskey without a permit;
469 the transporting of the said whiskey from Hobbs, Kentucky to Chicago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Michael Heitler et al.

Now comes Nathaniel Perlman, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Nathaniel Perlman, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of any such conspiracy or combination as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

470 7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trustworthy evidence but is tainted with self-contradictory statements or expressed malice or both.

8. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell or possess for sale intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to possess for sale intoxicating liquor, to wit, whiskey, at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which had as an object the purchasing of whiskey without a permit; the transporting of the said whiskey from Hobbs, Kentucky to Chicago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Nathaniel Perlman et al.

471 Now comes Mandel Greenberg, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Mandel Greenberg, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of any such conspiracy or combination as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trustworthy evidence but is tainted with self-contradictory statements or expressed malice or both.

472 8. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell or possess for sale intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to possess for sale intoxicating liquor, to wit, whiskey, at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which had as an object the purchasing of whiskey without a permit; the transporting of the said whiskey from Hobbs, Kentucky to Chicago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Mandel Greenberg et al.

473 Now comes Frank McCann, defendant in the above entitled cause, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, at the close of all the evidence and moves the court to direct the jury to find him, the said Frank McCann, not guilty upon the following grounds:

1. No offense against the United States is charged in the indictment.

2. The evidence adduced fails to prove the existence of any such conspiracy or combination as is charged in the indictment.

3. The evidence adduced fails to prove that the said defendant was a party to the conspiracy or combination charged in the indictment at its inception.

4. The evidence adduced fails to prove that the said defendant, after the inception of the said conspiracy, became a party thereto.

5. The evidence adduced fails to prove that any one of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of any such conspiracy or combination as is charged in the indictment; or was an act committed or done by the said defendant or by any co-conspirator acting in his behalf.

6. The evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

7. The only evidence adduced to implicate the said defendant in any offense is the testimony of witnesses who are shown by their own testimony to have been implicated in the said offense, which testimony is not only uncorroborated by trust-worthy evidence but is tainted with self-contradictory statements or expressed malice or both.

474 8. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was to transport, sell or possess for sale intoxicating liquors, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

9. The evidence adduced fails to prove that the said defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to possess for sale intoxicating liquor, to wit, whiskey, at Chicago, Illinois.

10. The evidence adduced fails to prove any such conspiracy as is charged in the indictment in that the evidence, if it shows anything, shows the existence of several conspiracies, none of which had as an object the purchasing of whiskey without a permit; the

transporting of the said whiskey from Hobbs, Kentucky to Chicago, Illinois; the selling of the said whiskey at Chicago aforesaid; and the possessing said whiskey for sale at Chicago aforesaid, in manner and form as the said four offenses are in the indictment set forth and alleged.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Frank McCann et al.

475 Which said motions and each of them, made by the said defendants, were severally overruled and denied by the Court.

To which action of the Court in overruling the said motion by the defendant Michael Heitler to direct a jury to find him, the said Michael Heitler, not guilty, the said Michael Heitler, by his counsel, then and there duly excepted.

To which action of the Court in overruling the said motion by the defendant Nathaniel Perlman to direct a jury to find him, the said Nathaniel Perlman, not guilty, the said Nathaniel Perlman, by his counsel, then and there duly excepted.

To which action of the Court in overruling the said motion by the defendant Mandel Greenberg to direct a jury to find him, the said Mandel Greenberg, not guilty, the said Mandel Greenberg, by his counsel, then and there duly excepted.

To which action of the Court in overruling the said motion by the defendant Frank McCann to direct a jury to find him, the said Frank McCann, not guilty, the said Frank McCann, by his counsel, then and there duly excepted.

To which action of the Court in overruling the said motion by the defendant George F. Quinn to direct a jury to find him, the said George F. Quinn, not guilty, the said George F. Quinn, by his counsel, then and there duly excepted.

476 Whereupon, at the close of all the evidence in the case, John J. Kelly, Assistant United States Attorney, made an argument to the jury for the United States, in the course of which argument, the following remarks were made and the following instructions of the Court given, to-wit:

Mr. Kelly: Now, we will take the case of Mandel Greenberg: We have shown by the testimony of Mossy Joy, and Miller, and Moore, that Mandel Greenberg was one of the Big Three in this conspiracy, notwithstanding the fact that Mandel Greenberg presented a framed alibi for the consideration of this jury.

Mr. Symmes: Just a moment. If your Honor please, I will ask the reporter to read the statement of counsel.

The Court: Read the statement.

(Whereupon the last statement of Mr. Kelly was here read by the stenographer.)

Mr. Symmes: The statement that Mandel Greenberg presented a framed alibi, we object to.

The Court: The argument is proper. It is a matter of inference. I am not saying whether it is a fact or not.

Mr. Symmes: Exception.

To which ruling of the Court, and statement of counsel to the Jury, the defendants, and each of them, by their respective counsel, then and there duly excepted.

Mr. Kelly: If you have any tears, prepare to shed them now, Mike Heitler is ascending the witness stand. With measured tread and downcast eyes, Mike walks to the chair. You would
477 think that Mike was going to the electric chair, he is so shocked. In answering questions of his counsel, he is meek and humble, "Yes, sir, no sir."

Why, it is not the same man that threatened Morris Frank with death in the Englewood Station. It is not the same King of the Underworld, who, by the snap of his finger, holds the lives of men in his grasp. No, but he tried——

Mr. Symmes: Now, just a moment. I object to that statement of counsel, if your Honor please. I don't know whether your Honor heard the statement. Will you read the statement of counsel?

(Whereupon the statement of Mr. Kelly was here read by the stenographer.)

Mr. Symmes: The king of the underworld, who holds the lives of men in his grasp, by the snap of his finger, that line of argument is objetced to, if your Honor please.

The Court: I recall no testimony that will support such an argument. You recall the testimony——

Mr. Symmes: I ask the Court to instruct the jury to disregard the argument of counsel.

The Court: The statement that he was the king of the underworld, who holds the lives of these people at the snap of his finger, is improper.

To which statement of counsel for the Government the defendants, and each of them, by their respective counsel, then and there duly excepted.

478 Mr. Kelly: You have heard the testimony, when asked whether or not he was ever convicted in the United States Court, under the White Slave Act,——

Mr. Symmes: If your Honor please, the White Slave Act was never mentioned, there is not any conviction under any White Slave Act, and it was not mentioned, and I take an exception to the statement of counsel.

Mr. Kelly: The White Slave Act was mentioned.

Mr. Symmes: I insist it was not.

Mr. Kelly: The name Mann Act and White Slave Act both were mentioned.

Mr. Symmes: No.

The Court: My recollection is that he was asked whether he was convicted under the White Slave Act or the Mann Act.

Mr. Symmes: My recollection is, the Mann Act.

The Court: I cannot recall it, but my recollection is that they were both mentioned, and then a conspiracy to violate the law, but I cannot recall whether he said he was convicted under the White Slave law or the Mann Act or under the conspiracy statute. It seems to me it was the latter.

Mr. Kelly: And Mike answered "Yes," and he cried. Mike is true to his type, yellow, when he is cornered, resorting to any means to get out of a tight place.

If all the tears that Mike caused were gathered in one reservoir, Mike Heitler could swim in it.

Mr. Symmes: I object——

Mr. Kelly: Asking for mercy——

Mr. Symmes: Now, just a moment. I object to that statement of counsel, and take an exception to it, if your Honor please,
479 that if the tears that Mike caused were gathered together, they would form a reservoir in which he could swim.

Mr. Kelly: You haven't quoted me quite right.

Mr. Symmes: I beg pardon.

(Statement read.)

The Court: I think it is legitimate argument.

To which ruling of the Court, and statement of counsel to the jury, the defendants, and each of them, by their respective counsel, then and there duly excepted.

Mr. Kelly: Mike was playing a part when he sat in this witness chair. He is a great actor. He wanted to impress and show you how meek and humble he is.

How much like Shylock Mike looked. He demanded his pound of flesh and he bled his victims——

Mr. Symmes. Again, if your Honor please, I object to that, in particular, in view of the defendant's nationality, as an appeal to the Jury, against the nationality of my client, because he happens to be a Jew, and an appeal to their prejudice, for that reason.

Mr. Kelly: If the Jury has such an idea, I wish to state that it is not an appeal to prejudice.

The Court: The argument is a legitimate argument so far as he may comment upon appearance, manner, or anything else disclosed by the testimony. I wish to say, however, that if any of you think there is any reference to religion in the statement, that you will not decide this case upon race or religion. They are all
480 in the same position. Race and religion, of course, have no bearing in this case, any more than sympathy or prejudice.

As to whether or not the defendant, Heitler, impressed you as playing a part or not, that is for you to say, and it is a proper subject for counsel to argue.

To which ruling of the court, and statement of counsel to the Jury, the defendants and each of them, by their respective counsel, then and there duly excepted.

Mr. Kelly: I wish also to state that there is no idea on my part to bring in anybody's race or religion.

The evidence shows here that Mossy Joy got back his diamonds, his stick-pin and his ring, and he got them back after he made this demand on Heitler.

Now, if Heitler had nothing to do with this, how could Heitler have gotten him back his diamond ring and his stick pin?

Mr. Symmes: If your Honor please, I object to that statement. There is absolutely no evidence, nothing in this record, from which you can say, or no inference that you can draw, that Heitler ever sent back Mossy Joy's ring, his stick pin, or any other jewelry, and there is not anything in this record in any way connecting it.

Mr. Kelly: The jury heard the evidence.

The Court: I think that the jury will have to pass on that question, too.

To which ruling of the Court, and statement of counsel to
481 the Jury, the defendants, and each of them, by their respective counsel, then and there duly excepted.

And thereupon, following the aforesaid argument by Mr. Kelly, Mr. Symmes addressed the jury on behalf of the defendants Heitler, Perlman, Greenberg and McCann, in the course of which argument the following instruction of the Court was given, to-wit:

Mr. Symmes: Mr. Kelly speaks of Shylock and his pound of flesh. Has anyone been after any pound of flesh here? If anyone has been after a pound of flesh, it is Mossy Joy, not Heitler.

Perlman and Heitler and Greenberg are Jews. You gentlemen said, notwithstanding the fact that they were Jews, that you could give them a square deal.

The Court: I think I should say, Mr. Symmes, that I now think that remark of Mr. Kelly's was improper, as to any reference to a Shylock, or the demanding of a pound of flesh. There is nothing that justifies it. I thought at the time,—I was taking notes on other matters,—that he was speaking about the conduct of the defendant Heitler on the stand. It is entirely unworthy to make remarks about any man's religion, or demanding any pound of flesh.

Mr. Glass: Your honor sustained the objection, and said it was improper, and he should not have done it.

The Court: Yes.

Mr. Kelly: Mr. Kelly explained the remark to the jury right afterwards.

The Court: I understand he did.

482 And thereupon Mr. Kirkland addressed the jury, on behalf of the same defendants, in the course of which argument the following admission was made, to-wit:

Mr. Kirkland: Now, gentlemen, there was a conspiracy in this case. There is not any question about that. There was a conspiracy. And there was a carload of liquor unloaded at 83rd and Vincennes on the Rock Island tracks, on the 1st of October, 1920. And some people went out and solicited saloon keepers to buy that liquor and that is the way they got the money to pay for that carload.

Whereupon the Court charged the jury as follows:

The Court: Gentlemen of the Jury: The case has reached that point where it is now to be submitted to you to determine the guilt or innocence of each of these defendants. It is for you to determine the facts and for the Court to announce the law. The issues of fact, should, however, be determined in the light of these instructions.

This is a criminal case and there are two rules of law governing the trial of all criminal cases to which I wish to call your attention.

Each of the defendants is presumed to be innocent, and this presumption attends him throughout the trial. You must consider all of the evidence with that presumption in mind and attempt to reconcile the testimony with this presumption. This presumption is part of the legal defense which you are not at liberty to disregard.

Another rule of law pertains to the quantum of proof necessary to justify a conviction. The burden of establishing the charge is upon the government. A defendant need not prove himself innocent. The government is required to establish his guilt beyond a
483 reasonable doubt. You cannot convict upon suspicion. A reasonable doubt is what that term implies, a doubt founded in reason. One is said to have established his case beyond a reasonable doubt when there is no doubt founded in reason sufficient to support a verdict of not guilty. A reasonable doubt as here meant is such a doubt as would cause a reasonably prudent man to hesitate in a very important transaction. It is not a whimsical possibility but must be of such a character that if you were dealing with one of your own most important affairs you would hesitate before you acted; you would be uncertain as to what course to pursue.

You are the sole judges of the credibility of the witnesses. In determining what weight you should give to the testimony of any witness or of any party you should consider his interest, if any, his bias or prejudice, if any is disclosed, and apply all those tests which your common sense and good judgment tells you should be applied in determining the weight of any testimony. Where there is a conflict in the testimony of any of the witnesses, if any appears, you must apply those tests of credibility and any other which your common sense and good judgment suggests and determine what the truth is. If any witness or any party has testified falsely in any material respect, you may, though you are not required so to do, disregard his entire testimony, unless corroborated by some other credible evidence.

You must view this case from the standpoint of each defendant. You may, therefore, if the evidence so satisfies you, acquit any one or more of the defendants and find the others guilty. Each defend-

ant is entitled to stand on his individual case and his individual defense.

The government is required to prefer its charges in the form of an indictment that the defendants may be prepared to make their defense. The defendants cannot be convicted of any crime
484 that is not charged in the indictment, nor is the presentation of this indictment any evidence of the guilt of any of the defendants.

The charge which the government has preferred against the defendants in this case is called by the lawyers a conspiracy charge because it sets forth an alleged violation of Section 37 of the Criminal Code which defines a criminal conspiracy and provides punishment of those who violate this statute. I think I hardly need read it to you.

It charges that these defendants, naming them, and I will call your attention to the twelve that are still remaining in the case; Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George Hans, William A. Gorman, George F. Quinn, William J. Truedel, Frank McCann, James O'Leary, Nicholas Ambrosi, John McGovern, George F. Callaghan, conspired with others to violate the Prohibition law; Section 37 of the criminal code, which is the section that the Government claims has been violated, reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years or both."

485 You will notice that this offense consists of two elements; first, the unlawful combination of two or more persons to commit an offense, and second, an act by one of the parties to effect the object of the conspiracy. This statute requires that at least two parties join the conspiracy. One party alone cannot commit this offense.

You will also note that the crime is separate and distinct from the substantive offense or offenses which may be the object of the conspiracy.

In this case, the government charges the defendants with having conspired to violate the National Prohibition law. Without going into details, let me say the National Prohibition Law provides that "No person shall, on or after the date when the Eighteenth Amendment of the United States Constitution goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as provided in this act."

In general it may be said that the law prohibits dealing in intoxicating liquor or shipping intoxicating liquor excepting for medicinal purposes or for sacramental uses, and for these uses permits must be issued by the duly constituted agencies of the government. It was therefore unlawful to ship whiskey from Louisville, Kentucky, to Chicago, without a lawful permit. It was unlawful

to sell this liquor and unlawful for any individual to have this liquor in his possession unless it was for medicinal or sacramental uses.

486 I charge you that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition law, unless you find that such possession or such sale was for medicinal purposes or sacramental uses.

You should therefore, early direct your attention to this question: Was there a conspiracy to thus violate the National Prohibition law?

What is the conspiracy within the meaning of this statute? When can it be said that two or more parties conspired together to commit an offense against the United States? To these questions you naturally desire an answer.

It is not necessary in order to establish a conspiracy that the proof show a written agreement or an exact verbal agreement. It is not necessary that the government show that the conspirators met and said "I agree with you that we shall violate the National Prohibition Law and ship and sell whiskey in violation of this law."

A conspiracy may be established by circumstantial evidence or by deductions from facts and by inferences. It is seldom indeed that parties entering into a criminal conspiracy reduce their agreement to writing or call in anyone to witness their agreement. Those who are violating the criminal statutes generally endeavor to conceal their wrong-doing and leave as little evidence of their guilt as possible. Guilt may therefore be established by circumstantial evidence, or by deductions or inferences.

It is sufficient to show that parties acted together to accomplish something unlawful even though the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others.

487 The common design is of the essence of the crime, and this may be made to appear when the parties steadily pursue the same object, whether acting separately or together, by common or different means, but leading to the same unlawful result.

When an unlawful end is to be effected and two or more persons actuated by a common purpose of accomplishing that end work together in furtherance of the unlawful scheme, such persons become conspirators, although the part which anyone of them is to take in the conspiracy is a subordinate one and its execution at a remote distance from the other conspirators.

All the parties need not be acquainted with each other. They may not have previously associated together. One party may know but one other member of the conspiracy. But if, knowing that some other individuals have combined to violate the law, a party cooperates and does something to further the object of the conspiracy he becomes a party to the conspiracy.

One may join a conspiracy after it has been formed, and from the moment he joins the conspiracy he becomes liable the same as if he was one of the original parties to such conspiracy. One

joins the conspiracy when he knowingly participated in it, when he does something to further the object of such agreement, fully recognizing and intending that his action shall further the success of the enterprise.

Let me illustrate this by taking an abstract case. A, B and C, or A and B may enter into an agreement to do something which is in violation of a Federal statute. The statute which they intend to violate may deal with the revenue law, the income tax law, the postal law, the liquor law, or any other subject. If the action which
488 the said A, B and C contemplate and agree to do is a violation of any of these laws, then there is a conspiracy established within the meaning of this statute to which A, B and C are parties. If, thereafter, and while the conspiracy is still in force, D, E and F join it, they become liable the same as though they were original parties to it. They may not know of the details, they may not fully understand all of the means by which the object of the conspiracy is to be executed, but if they understand that a Federal law is to be violated and that certain parties have a working agreement to violate this law, and they join their efforts with the other parties to accomplish this purpose, then they may be said to have joined in the conspiracy. And it matters not whether the part which any one takes is a minor or a major one. One defendant or several defendants may be the devisors and center of the conspiracy, yet if the others joined with knowledge and criminal intent, they thereby become parties as fully as though they played the principal role or were original parties to the conspiracy.

And using these letters again, let me say, it makes no difference whether A, B and C conceived the scheme and D, E and F joined, or whether D, E and F were the originators and A, B and C joined it. In either case, each is equally liable.

Now, briefly stated, the government claims that the evidence tends to establish that certain individuals formed a conspiracy to violate the National Prohibition Law by causing a certain carload of whiskey to be secured at Hobbs, Kentucky, and to be shipped to Chicago, Illinois, under an alleged government permit, and to be unloaded in Chicago and distributed to persons who were not under the law entitled to receive the same.

489 As I view the evidence there is not much dispute about certain facts, and while you are not required to accept my opinion concerning any facts unless they accord with your own, I am nevertheless going to express it concerning these facts which appear to me to be quite free from doubt. I do so in order that I may better direct your attention to those issues which are in dispute and in order that you may not be confused. I repeat, my opinion on all questions of fact must yield to your own, and unless these views accord with your own you should not accept them.

It appears to the court that the evidence clearly establishes or clearly tends to establish that there was a shipment of one carload of Old Grand Dad whiskey from Hobbs, Kentucky, to Chicago by way of Peoria; that such whiskey was secured from the distillery company through the use of a certain paper purporting to be a govern-

ment permit running to Max Berkson which purported permit was in fact not genuine, but spurious or illegal; that such whiskey was unlawfully secured and unlawfully transferred to Chicago; that it was there unloaded in a station on the Rock Island Railroad on the evening of October 1, 1920; that the consent to unload such whiskey by the railroad agent was secured through the presentation of this illegal permit running to said Max Berkson, and which permit was presented and signed by an individual claiming to be Max Berkson and his identity was vouched for by the defendant William Gorman, that the whiskey was unloaded from the car into ten automobile trucks and taken to various parts of the city in violation of the National Prohibition Law.

490 The evidence further tends to establish that such shipment and such distribution and such possession was pursuant to a conspiracy by certain individuals to violate the law.

Should you find the evidence establishes these facts you will then consider the remaining question: Who, if any, of the defendants were in the conspiracy? Before taking up this question, let me make a few general observations concerning certain classes of testimony.

You may find that individuals other than the defendants in this case were in the alleged conspiracy to violate the National Prohibition law in the manner set forth in this indictment. You will not concern yourselves with any individual not named in this indictment, or not now before you. The fact that others may be guilty of this same offense does not excuse any of the defendants before you, should you find them or any of them to have participated in the conspiracy.

Whether any party other than the defendants should be prosecuted or when they should — prosecuted or how they should be prosecuted is not a matter in which you are now interested.

The indictment charges that various individuals who are on trial before you as well as others joined in this conspiracy to violate the National Prohibition Act. Who the others may be is of interest so far as this case is concerned only as their connection or their story tends to establish the guilt or innocence of the defendants before you.

Certain parties who were originally named as defendants in this indictment have been dismissed out of the case. They are not now before you, and you will not now concern yourselves with any of them excepting as their testimony may be the subject of consideration, in which case you will give it such weight as in your judgment it deserves.

491 Certain defendants have offered the testimony of witnesses to prove their good reputation as law abiding citizens. This was received to help you ascertain the truth of this matter. For it is a matter of common knowledge that an individual whose conduct has won for himself a good reputation in this respect is not as likely to violate the law as a man who has a bad record or poor reputation. In fact, I might add that under some circumstances, and in some cases, a jury would be justified in finding a reasonable doubt from this testimony alone.

But it all depends upon the facts in the individual case. You should consider this testimony along with all the rest of the testimony in determining what weight you should give to it.

Testimony was received tending to show that one defendant has been heretofore convicted of a criminal offense. This testimony was received merely to help you weigh the testimony. It was like turning on the light, that you might better scrutinize the rest of the testimony.

Any reference by the prosecuting attorney to this man's activity outside of this case was improper, and I again admonish you to ignore it.

During the argument of the parties, some reference was made and the statement made by one of the counsel as to tears having been shed. I do not believe I understood the counsel who made the statement at the time, I am not sure; but I want to now at this time again admonish you that anything outside of this record, outside of what was received on the trial is not proper.

492 Several of the defendants did not take the stand during this trial. This was their privilege and no adverse deductions should be drawn from that fact. The Government could not call them to testify against themselves and the defendants were not required to take the stand on their own behalf. It was a matter of personal privilege with them, and their failure to so testify in their own behalf does not furnish any evidence for the Government.

Now, a word on the question of credibility of witnesses or parties. I can furnish you with no yardstick by which you can measure this testimony. In analyzing and weighing it, use your best judgment and your experience as ordinary men of affairs.

In attempting to ascertain the truth, you should consider the reasonableness of the stories related by the witnesses and the parties and the way such stories connect up or dovetail with such facts over which there is no dispute or about which there is no doubt in your mind. You may likewise check up such testimony with statements made at an earlier date.

Much testimony was received bearing upon dates and hours. As men of ordinary experience, you know how difficult it is to fix accurately the date or the hour of a common or ordinary occurrence. Men and women with reasonably good memories find it difficult after the lapse of considerable time to fix dates and hours or to relate in detail matters of common occurrence.

The uncertainty of memory and the difficulty of fixing dates and hours has been frequently illustrated by the testimony of witnesses on both sides during this trial. Witnesses have attempted to
493 fix dates and hours several months back and some of them at least have been unable to locate the date of an occurrence that transpired within three or four days. For example, they have not been able to locate within a week the day when they talked with counsel concerning their testimony although admitting that such occurrence took place not more than three weeks before the day they testified.

While this class of testimony is competent and cannot be ignored

when it relates to material issues, it should be scrutinized by you carefully with its possible weaknesses in mind.

A word about the testimony that relates to minor or common matters. Little things do not impress people as much as important transactions. When witnesses describe trivial matters exactly the same or when the same unimportant or uneventful matter are related exactly the same, you should scrutinize their stories carefully, for it may be either persuasive or it may be suggestive of rehearsal or practice in concert outside of the court room.

A statement or an act of one defendant is not ordinarily binding upon any other defendant. His admissions may, of course, be used against himself, but the admission of one defendant may be considered against another defendant in this kind of a case,—in a conspiracy case,—under certain circumstances. If you find that such other defendant is in the conspiracy, that the conspiracy is not ended, and the statement is made in furtherance of such conspiracy, then his statement may be considered by you as evidence in the case as against those you find to be in the conspiracy.

Now, while you may be able to reconcile some of the conflicts in the testimony, attributing the discrepancies or disputes to natural mistakes in dates or hours, or uneventful occurrences, and it is your duty to thus reconcile the conflicts in the testimony wherever
494 possible, there are some matters that cannot be reconciled.

For instance, you cannot reconcile the statements made by several witnesses that they paid large sums of money, sums running into thousands of dollars, with denial by the defendants that such sums were paid. For example, Frank and Greengaard and Miller and Joy and Fitzpatrick testified to the payment of large sums of money. The defendants Greenberg, Heitler and Perlman deny that they or any of them received any of it. Nor can you reconcile the statement of certain witnesses that they were paid back certain moneys that they paid for the whiskey with denial by the defendants. This conflict, I say, is not capable of reconciliation. And this dispute may become the crux of the case so far as these three defendants are concerned.

This issue you must face squarely. There can be no reconcilation of the testimony. Some one has testified falsely. Either the story told by these witnesses was pure fiction, pure imagination, or it was the truth. As a background for this issue, you have the facts concerning which there is little or no dispute. For this background, you may find that some individuals conceived a bold and daring conspiracy to violate the law, the execution of which required considerable capital and credit and some brains. On the one side are the two Franks, Greengaard, Joy, Miller, Moore and Fitzpatrick, and on the other side are the three defendants, Heitler, Perlman and Greenberg. In addition thereto, witnesses on both sides testified to other facts and circumstances which, while not bearing directly upon what took place at Perlman's saloon, yet having a bearing on this issue.

In directing your attention to the evidence, I expect to suggest numerous questions. They are suggested for the purpose of direct-

ing your attention to the heart of the controversy and to sup-
495 ply you with tests whereby you may better weigh the testi-
mony. They are not indicative of the court's state of mind.

Certain of the Government's witnesses have been called accomplices. They are witnesses who admit that they are parties to the crime charged in the indictment. Their testimony should be scrutinized closely to ascertain whether they are influenced or not by any hope of immunity or by any other unworthy motive. Admitting their own guilt, their testimony is not entitled to the same weight as the testimony of an innocent party. The defendants are also vitally interested, and their interest in the outcome of the case may be considered by you in weighing the testimony of such as have testified.

But the fact that certain witnesses who have testified may be accomplices, or that the defendants are interested in the outcome will not justify you in rejecting their testimony on that ground alone. The Government in criminal cases must sometimes offer the testimony of those who are parties to the crime. Innocent individuals may know nothing of the details of the crime, and only the guilty parties can enlighten you about the criminal transaction.

Let me refer again to an imaginary case by way of illustration, to aid you in determining what weight might be given to the testimony of an accomplice. Assume, if you will that A and B are indicted and on trial for entering the house of X in the night time and with the intent to burglarize it. C appears as a witness and states that he was with A and B on the night in question and all three of them broke into the house of X and took therefrom moneys, jewelry and bonds. Now, C's testimony shows him to be a confessed accomplice. The jury would therefore approach his testimony with some caution. They would be required to scrutinize it closely, not reject it, but scrutinize it carefully, and only cautiously accept it.

Now, assume that there is other testimony,—that X testified
496 that he and his family left home early that evening, and
returned home early the next morning, and found their house had been burglarized and that moneys, jewelry and bonds had been taken and the description of the goods taken corresponded with C's testimony. There would be corroboration of C's testimony.

Now, assume further that another witness testified that he saw the three, A, B, and C together at a place and at an hour quite unusual and yet consistent with C's entire story. In such a case, the corroboration of details in C's story might make C's testimony most persuasive of the truth. In other words, you are the only ones who can finally say whether testimony is weak or persuasive, and whether it is weak or persuasive will depend largely upon whether it is reasonable, whether it tallies with other testimony, and whether it corresponds with what you think is true. Searchingly inquire whether their stories are reasonable or unreasonable. Do they fit in with the other witnesses' recitals? Were any of the truck loads of whiskey "stuck up," to use the expression of certain witnesses? If so, why did those whose loads were taken, go to Perlman's saloon, at that hour? Did they expect to find Heitler there at that hour of the night,

or did they go there after seeing Heitler and Perlman pursuant to a talk with them? Why should any of these parties, Frank, Fitzpatrick, Greengaard, Miller or Joy, connect Perlman or Heitler or Greenberg with this offense? What motive could the witnesses have for saying they received money back from either of these three defendants? I say, I ask you these questions that you may better search into the truth, and not with any desire of expressing
497 any opinion that I may have upon the guilt or innocence of any defendant.

You may likewise find that other witnesses who testified in this case were accomplices; for example, the truck drivers or other individuals who were present at the car. The same rules govern their testimony. You have a right in accepting or rejecting their testimony to inquire whether it corresponds with the statements of other witnesses. You have, for example, in evidence, the written memorandum of the witness Koehler, the Rock Island agent. The number of cases and the number of the truck licenses are there given. It may be considered by you in determining what weight should be given to the testimony of the other witnesses whom you may find were accomplices. In other words, where stories, unrelated or disconnected, are in complete or reasonably complete accord, they thereby become more persuasive of their truth.

It likewise appears from the testimony bearing upon this issue that certain witnesses who testified here gave statements to the police officer on Sunday morning following the delivery of this carload of whiskey. One of these statements, given by the witness Frank, is in evidence. Consider the circumstances under which it was given, the time and the place, check it up with the story here told by the defendants or government witnesses. Having given the statement, why did he not sign it? Was he influenced by Heitler, or was the statement false? Do the statements of either Miller or Joy or Fitzpatrick, given before the police officer on this occasion, vary in material respects from the statements given here? Did these parties confer concerning these statements before they were given? If not, are they in accord?

I repeat, Gentlemen of the Jury, the issue is squarely presented. It involves a study of the motives, of reasonableness and of
498 comparison with facts concerning which you have no doubt. While not in any way desirous of influencing your conclusions, I want no misunderstanding of the vital and determining issues of the case, and I expect a verdict to be based upon a careful and analytical analysis of the testimony made with these vital issues clearly in your mind.

As to the defendants other then Heitler, Perlman and Greenberg, the position of the Government is different. It is not claimed as to them that they originated or conceived the conspiracy, but that they joined it or participated in it in some manner after it was originated.

As to the defendants McGovern, O'Leary, Callaghan, and Ambrosi, it is claimed that they participated as purchasers or recipients of the whiskey, knowing that it came from the car so shipped into Chicago

pursuant to this conspiracy. Did either of these defendants purchase or receive any of the whiskey out of this carload of Grand Dad whiskey? Did they or either of them know that this whiskey was shipped, sold and possessed pursuant to the conspiracy? Apply what I have said as being the law governing the participation of one in a conspiracy already formed to these defendants.

As to the defendant Gorman, the government claims his guilt is due to his connection with the illegal transaction which resulted in the delivery of the car of whiskey by the Rock Island station agent to one who called himself Max Berkson. Did Gorman act innocently, merely as an accommodator? Why did he go back to the car a second time? Did he go into the station to tear off his name as the identifying party on the permit? If he tore off his name from the permit, why did he do so? The consideration of these questions presents the issue so far as Gorman is concerned.

If Gorman acted innocently,—with no guilty knowledge of any conspiracy to violate the National Prohibition Act, you should find him not guilty. If, on the other hand, he participated, knowing that the law was to be violated by the combination of others,
499 and he acted in order to further this object, he is guilty.

As to the defendants Quinn, Trudel, and McCann, the Government bases liability on alleged participation in the conspiracy by reason of their selling part of the carload of Grand Dad whiskey for a commission to others. As to these three defendants, also, I wish to say that unless you are satisfied beyond a reasonable doubt of their guilt, you should find them not guilty regardless of what your verdict may be as to the others.

As to the defendant George Hans, his liability, if any, is dependent upon his connection with the transaction of the night of October 1, or on the morning of October 2nd. He, too, may be guilty or innocent regardless of your verdict as to any other defendant. You should scrutinize all testimony of identity carefully, and make sure that there has been no mistake as to the Defendant Hans' identity.

Now, before the crime of conspiracy may be completed, there must be an overt act, so called, committed by one of the conspirators in furtherance of the scheme. Let me again illustrate by reference to an imaginary condition.

If A. B. and C. should meet and agree to violate a certain law, but before any one of them did anything to carry out the unlawful conspiracy, they withdrew from the scheme and abandoned it, then no crime would be committed. If, however, after having the plan or scheme agreed upon, that is, after the formation of the conspiracy, by any two or more parties, any one of them does any one of the acts charged in the indictment to effect the object of the conspiracy, then the crime is committed.

It may be done by any one of the conspirators. Such act may not of itself be criminal in character. It may be innocent in character in and of itself. Any one of the acts set forth in the indictment, whether of itself innocent or criminal, if it be done by one of the conspirators after the conspiracy is formed, and to effect the object of the conspiracy, satisfied the requirements of the statute. For ex-

ample, if Michael Heitler, Nathaniel Perlman or Mandel Greenberg or any of them collected any money from any of the defend-
500 ants or parties to the conspiracy, that would be an overt act which would satisfy the statute, as to any and all of those parties who you find to be conspirators.

This case has lasted some time. You have been most patient and, as I have observed, most attentive to the trial. It is not necessary. I am sure, for me to suggest that your duty is a responsible one. This case is an important one,—important alike to the defendants, and to the Government. Some one has deliberately and designedly violated this law of the country, and yet the fact that the law has been thus violated affords no justification for convicting any defendant unless you are satisfied beyond a reasonable doubt from the evidence that such defendant was a party to the conspiracy. Be not swayed, then, by prejudice for or against any one because of his race or his religion. Likewise, be not influenced by any sympathy for any party because of family or children. Your duty can only be performed by a calm and dispassionate and just and fearless consideration of the evidence. You are the triers of the fact, and let your verdict clearly reflect the facts.

You are not to concern yourselves with the punishment. If any of the defendants are found guilty, the duty of imposing sentence, whether a fine or imprisonment, rests upon me.

If I have not made myself clear in this charge, you are at liberty to return and ask for further instructions. Do not hesitate to do so. Before returning, however, be sure that you do not understand the matter and that it has some bearing upon the case.

Likewise, if you are unable to agree upon what the testimony is, you have a perfect right to return and ask me for such information. I appreciate that it is hard for strangers to a case to slip into a jury box and appreciatively understand all the testimony as it first comes in. I say this, because I know how hard it is for me to get
501 the significance of all of the testimony as it first comes in. I would like to read the important part of the testimony of the various witnesses at this time. But that is impossible. It is for this reason that I say that you are at liberty to ask that any testimony concerning which there is uncertainty or over which there is a dispute may be read.

Three forms of verdict will be submitted to you, that you may use that one which properly expresses your conclusion. The first one I will read, as follows: "We, the jury find the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George Hans, William Gorman, George Quinn, William Truedel, Frank McCann, James O'Leary, Nicholas Ambrosi, John McGovern and George F. Callaghan not guilty." If you find each and every one of the defendants not guilty, you will sign this verdict. You will notice that I have named each defendant who is now in this case,—in this, and the next form of the verdict.

The next form merely reads,

"We, the jury find the defendants," naming them again, "guilty as charged in the indictment." If you find each and every one of the defendants guilty as charged in the indictment, use that form.

Still another form is submitted, whch reads as follows: "We, the jury find the defendants"—and I leave a space for you to write the name in—"guilty as charged in the indictment, and the defendants",—naming them,—leaving a place for you to write their names in—"not guilty." In other words, if you find some guilty, and some not guilty, you will have to use this third form.

In deliberating upon this case, you will be called upon first, to elect your foreman. And let me suggest, when you get to the consideration of it, that you do not allow yourselves to get angry, do not say hasty things, or get into such a state where a disagree-
502 ment may be the inevitable result, but go back, retrace your steps, and see where you differ, and then move forward again together, making certain, however, that each one of the jurors understands what the verdict is as to each one of the defendants. I do not want any possible misunderstanding to come up afterward.

Are there any suggestions or criticisms or additions by either counsel?

Mr. Kirkland: I have a few, if your Honor please. Will I make them now?

The Court: Yes.

Mr. Kirkland: The court, as I understood the charge, told the jury what the Government's claim was, and then named several facts that your Honor said were established. I take no exception to those. I agree with the court upon those, if I understood the court correctly. The court then went on to say that the question was then, who, if any, of the defendants, were in this alleged conspiracy. Your Honor, as I caught it, instructed the jury that they should not concern themselves with any individual not named in the indictment. I ask the court to charge the jury that the defendants that I represent, have contended, as the court has told them what the Government's claim was, that this conspiracy to buy and transport and to sell this liquor was a conspiracy on the part of certain witnesses introduced by the Government, Joy, et al., and to that extent they should at least consider Joy, Miller, and perhaps the others, even though they were not named in the indictment, to the extent of determining whether or not they were conspirators, or whether or not Heitler, Perlman and Greenberg were the conspirators. That is the first suggestion.

The Court: I do not think that counsel got all of what the court said. The court said, you should concern yourselves with these other parties only as their stories bear upon the guilt or innocence of the defendants before you.

503 Mr. Kirkland: I thought that the jury might be somewhat mislead to that extent. I request the court to give that.

The Court: I think that I have covered it now, and before.

To which refusal of the court to give the above requested instruction, the defendants, and each of them, by their respective counsel, then and there duly excepted.

Mr. Kirkland: In suggesting the names to the jury, the court said that on one side there were certain witnesses, Joy, Miller, and

others, naming them, and on the other side, some of the defendants, naming them. Then, the court went on to tell the jury about the testimony of an accomplice, and in naming the witnesses on the one side, the court did not name the witness Todd. I ask the court to instruct the jury that the witness Todd was an accomplice.

The Court: Under the rules, there should be no question, in my opinion, but what the witness Todd was an accomplice. Of course, I defined an accomplice generally. There may be numerous parties that I did not name specifically as accomplices. If anybody here stated any fact which showed that he was a party to this crime, he is an accomplice, and that includes Todd.

Mr. Kirkland: Then your Honor called the juror's attention to the statements made at the Englewood Police Station on the morning of Sunday, October 3rd, and you mentioned the fact that the statement of the witness, Morris Frank was in evidence, and you asked the jury to decide the question of why he did not sign, whether he was or not influenced by Mr. Heitler, or whether it was false. I call you- Honor's attention to the fact that upon cross-examination the witness Frank answered my questions, and said that the statement that I showed him as being made at the police station
504 was false. I ask the court to so charge the jury.

The Court: The court cannot very well charge the jury——

Mr. Kirkland: I ask the court to call the jury's attention to that particular piece of evidence.

The Court: I will gladly say that the questions that I submitted were merely suggestive questions that might be by you considered as helpful in determining the truth, and in answering those questions, you have to consider all the evidence. You saw Frank on the stand, and you know whether he told the truth at one time or whether he told it at another time, and you also know the circumstances under which that statement was given, and such circumstances as existed when he refused to sign it. So, you are the judge of that, and as Mr. Kirkland suggests, if there is any evidence, whether it comes from Frank's lips, or from his manner of testifying, or anywhere else, the policemen, you will consider it all in determining that fact. That is not the crucial question, of course, but it was one that I asked you merely to help elucidate the subject.

Mr. Kirkland: The court having charged the jury as to the Government's claim, I request the court to charge the jury as to the claim of the defendant Greenberg, that he was at some other place at the time at which the Government witnesses claim the money was paid. That is, an alibi defense is a perfectly legal defense.

The Court: I will say to you, gentlemen of the jury, that upon the Government rests the burden, and therefore, I stated their contention. If they have fallen down in that, for any reason, then the defense is established. The defendant, however, does not have to rely solely upon the denial, or the weakness of the other side, but he can establish defenses known as alibis. If that defense is established, that, of course, breaks down the claim of the Govern-

ment so far as that party, or so far as such other parties, whoever you may think are involved.

505 Mr. Kirkland: I make the same request as to the defendant- Heitler and Perlman, with regard to the Friday night, in particular, the 1st of October.

The Court: The same will be said about all the defendants, Heitler, Perlman and Greenberg, or any others, Mr. Hans, or anybody else.

Mr. Kirkland: I desire to except to that part of the court's charge where he told the jury that the whiskey was unlawfully transported from Kentucky to Chicago. In addition to that, as I understood, I will state to the court, I may not have gotten this exactly correct from the court's charge, but I understood your Honor's description of the conspiracy to be to purchase in Kentucky, unload and distribute in Chicago; we except to that part of the charge, as not being the description of the conspiracy in the indictment.

The Court: I do not know as I failed to make myself clear, but if there is any doubt, I will say what I stated about A, B and C forming a conspiracy to violate any law, the revenue law, the postal law, the liquor law, the income tax law, or any other law, I described to you what the National Prohibition Law was. I stated that it was unlawful to transport except under certain conditions, that it was unlawful to sell, and it was unlawful to possess, and I expressed my opinion from all the facts that the transportation was unlawful, that the selling was unlawful, that the possessing in Chicago was unlawful. Now, you do not have to accept my views as to the facts, unless you think so too, but it would be unlawful, unless those parties were either given a permit, and using it for sacramental purposes or for medicinal purposes, and it was my opinion that it was neither for sacramental purposes, nor for medicinal purposes.

Mr. Kirkland: Certain requests that were handed your Honor, in writing, may they be considered as having been called to the court's attention?

506 The Court: That one this morning?

Mr. Kirkland: That one this morning, and there were two or three others on Friday, or Saturday.

The Court: I am willing that the one you presented this morning—I received so many that I would not be willing to accept the suggestion that you except to those that have been submitted. There were so many pages that have been submitted that I would like to have my attention called directly to the one that you wish me to give.

Mr. Kirkland: That one this morning may be considered as having been suggested to the court?

Mr. Glass: I do not think we ought to discuss these in the presence of the jury any longer.

The Court: It is his duty to except to my charge before the jury retires. He has a perfect right to do so. Proceed.

Mr. Kirkland: If I understand correctly, the one I handed your Honor this morning may be considered as having been suggested to the court?

The Court: Yes.

Mr. Kirkland: Just one second. The court instructed the jury as to the law of circumstantial evidence. I ask the court, or request the court to charge the jury, in view of the claim of the defense in this case, that conspiracy was entered into by certain Government witnesses, I ask the court to charge the jury as to the law of evidence in that respect, that if the jury believe that the evidence points with equal consistency to the guilt of the people that we claim entered into the conspiracy as much so as it does to the guilt of the defendants, they could not be then satisfied beyond a reasonable doubt of the guilt of the defendants.

The Court: I think I won't give any further instruction upon that subject other than what I have already given. I have stated
507 if the testimony is capable of reconciliation with the defendant's innocence, it should be so reconciled, whether that applies to circumstantial or any other evidence. In other words, if it is consistent with innocense, they should be found not guilty even though it also be consistent with guilt.

To which refusal of the Court to give the above requested instruction, the defendants, and each of them, by their respective counsel, then and there duly excepted.

Anything further?

Mr. Kirkland: Just one second. This first part of this particular request. I don't care to state it in the presence of the jury. I request you to give that.

The Court: In view of what I have given, I think it is unnecessary to give that.

Mr. Kirkland: That is the first paragraph of that particular one marked "A," so the reporter will know it.

(Said instruction "A," is as follows to wit:)

"The court instructs the jury that if you find that a conspiracy existed, as alleged in the indictment, and that some one or more of the overt acts were committed, as alleged, the question then follows: Were the defendants on trial, or some of them, connected with that conspiracy as parties thereto? Mere passive knowledge of the illegal action of others is not sufficient to show complicity in the conspiracy. Co-operation in some form must be shown. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose. To establish the connection of either of the defendants with the conspiracy, such connection must be shown by facts or circumstances, independent of the declaration of others; that is, by his own acts, conduct or declarations."

508 To which refusal of the court to give Defendants' Requested Instruction "A," the defendants, and each of them, by their respective counsel, then and there duly excepted.

Mr. Kirkland: Will you mark that "B," and the other "A," so that we may have some way of identifying them.

(Said instructions were marked as requested.)

Mr. Kirkland: This one marked "B," I ask the court to charge specifically.

The Court: I have no objection to giving this charge just as you have written it. I think I covered it, or attempted to cover it, but if there is any question about it, I will read it to you.

(Whereupon said instruction was read by the court to the jury, as follows:)

B.

"The court instructs the jury that before any defendant can be convicted, the evidence must show beyond a reasonable doubt that a conspiracy existed as charged in the indictment, and that, at least one of overt acts charged in the indictment was done by a conspirator to effect the object or end of this conspiracy. By the dismissal from this case of Morris H. Gindich, O. H. Wathen and W. F. Knebelcamp, the second and third overt acts are removed from consideration as overt acts done by a conspirator. To warrant a conviction by any defendant, the jury must not only be convinced that a conspiracy existed as charged in the indictment, but the jury must also be convinced beyond a reasonable doubt that, in order to effect the object of the said conspiracy, either

First, that Michael Heitler, Nathaniel Perlman and Mandel Greenberg were conspirators, or that one of them was a conspirator, and that on or about September 25, 1920, at Chicago, they, or one or two of them collected a sum of money from Nicholas Ambrosi.

509 Or Second; that William Gorman was a conspirator and that he, on October 1, 1920, at Chicago, told G. F. Koeller that Morris Gindich was the Max Bergson who was named as consignee of the car of whiskey.

Or Third; that Michael Heitler, Nathaniel Perlman and Mandel Greenberg were conspirators and that they, or one or two of them, on October 1, 1920, were not only present at Gresham Station, but also unloaded the whiskey from the freight car."

The Court: I want to say with reference to that last that it does not have to be shown that they personally picked up the cases and carried them out. They could have participated in unloading the freight car without personally having carried out the goods.

To which qualification of the said — requested and given, the defendants, and each of them, by their respective counsel, then and there duly excepted.

Mr. Kirkland: This particular part that I called your attention to, they can write it into the record. That is all that occurs to me, your Honor.

The Court: Any other suggestions?

The Court: Anything further?

Mr. Kirkland: Just one other, and this is all I care to bother with. The request marked "C," I ask the court to so charge the jury.

The Court: Refused.

To which refusal of the court to give Defendants' Requested Instruction "C," the defendants, and each of them, by their respective counsel, then and there duly excepted.

510 (Said instruction marked "C," is as follows to wit:)

"The court instructs the jury that certain witnesses who have testified for the government—that is, the witnesses Morris Frank, Harry Frank, Louis Greengaard, John Fitzpatrick, John Miller and Maurice Joy—may be found by the jury to be accomplices. Accomplices are those who upon their own confession stand contaminated with guilt and admit participation in the very crime which they endeavor, by their testimony, to fix upon the defendants. If the jury find that any witness is such an accomplice, then the court further instructs the jury that an accomplice is an admissible witness, and a conviction may be had on the uncorroborated testimony of such a witness if the story as told is straightforward and has a ring of truth and indicates unequivocally the guilt of the defendants, but the jury are cautioned and advised to weight carefully such testimony, to take into consideration the inducements or temptations which might prompt such a witness to testify falsely, to consider the feeling or interest and the general demeanor of such a witness on the stand. And finally, the jury are advised not to convict on the testimony of an accomplice unless corroborated by other testimony of an untainted character or by material facts established by independent evidence.

Corroboration, within the meaning of this rule, means such support given to the accomplice's testimony as tends to establish the truth of that portion of his testimony which connects the defendants with the crime. It is not sufficient that some testimony may be found to establish a fact or circumstance testified to by an accomplice. The supporting testimony must also corroborate on the matter of guilt. It must have a tendency to prove what the accomplice's testimony, standing alone, was intended to prove."

The Court: Any other?

The Court: The officer will be sworn.

(Officer sworn.)

511 The Court: You may take the indictment, and such exhibits as the jury wish. If they do not get through at half past twelve, they can be taken to dinner.

Mr. Kirkland: The one that I handed you in Chambers this morning, can I have that in the record as refused?

The Court: Yes.

To which refusal of the court to give Defendant's Requested Instruction "D," the defendants, and each of them, by their respective counsel, then and there duly excepted.

(Said instruction was marked "D" and is as follows:)

"The court instructs the jury that the defendants are charged with a conspiracy to commit four offenses, that is, the offense of purchasing a certain one thousand cases of whiskey from the Old Grand Dad Distillery Company of Louisville, Kentucky, without first obtaining a permit from the Commissioner of Internal Revenue so to do; the offense of transporting the said whiskey from Hobbs, Kentucky, to Chicago, Illinois, for beverage purposes; the offense of selling said whiskey at Chicago for beverage purposes; and the offense of possessing said whiskey at Chicago with the intent of selling the same for beverage purposes. Because of the failure to negative exceptions contained in the National Prohibition Act, especially in Section 6 thereof, the indictment is defective in its description of the offense of purchasing without a permit, and the jury should disregard this allegation as surplusage. The indictment, therefore, is to be considered by the jury as if it charged a conspiracy to commit three offenses, that is, the offense of transporting, of selling and of possessing for sale, the said whiskey in manner and form as these offenses
are described in the indictment. Before any defendant may
512 be convicted in this case, it must appear that he was connected
with a conspiracy which had as an object or end the commission of all three of these offenses, and if the jury find that a defendant was a member of a conspiracy which had as an object or end the commission of only one or two of the said three offenses, then the jury must find that defendant not guilty."

513 Thereupon, on the 7th day of March, A. D. 1921, at 11.45
A. M., the jury retired to consider of their verdict.

Thereafter, on the 8th day of March, A. D. 1921, at 11.25 A. M. the jury returned into open court the following verdict:

No. 7465

UNITED STATES OF AMERICA

v.

MICHAEL HEITLER, NATHANIEL PERLMAN, MANDEL GREENBERG, FRANK MCCANN, and GEORGE F. QUINN.

We, the Jury, find the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, George F. Quinn, William Trudel and Frank McCann, guilty as charged in the indictment and the defendants George Hans, William Gorman, James O'Leary, Nicholas Ambrosi, John H. McGovern and George F. Callaghan not guilty.

Signed by the Jury.

Thereupon, and after the return of said verdict, the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, by their respective counsel, severally moved the Court to set aside the verdict so returned in the case and to

grant them and each of them, a new trial, the motion of the defendant Quinn being an oral motion and the motions of the defendants Heitler, Perlman, Greenberg, and McCann being in writing, which said written motions were in words and figures as follows, to wit:

Now comes the defendant, Michael Heitler, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that this defendant was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

514 2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that this defendant had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize this defendant as a "Shylock."

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

5. The court erred in sustaining the objection of the government to questions asked the witness Greengaard by this defendant relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicating liquor.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by the witness McCann that the witnesses Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy and his associates or the de-
515 fendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only so far as the connection or story of the said individuals tended to establish the guilt or innocence of the defendants.

11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government witnesses were the conspirators and not this defendant and the other defendants.

12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to support the contentions of the government without, at the same time, sufficienly placing before the jury the evidence which tended to support the contentions of this defendant.

13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant a continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were known to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

516 18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition Law, unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whiskey to be secured at Hobbs, Kentucky and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whiskey without a permit in manner and form as is charged in the indictment; to transport the said whiskey for beverage purposes in manner and form as is charged in the indictment; to possess the said whiskey for sale for
517 beverage purposes in manner and form as is charged in the indictment; and to sell the said whiskey for beverage purposes in manner and form as is charged in the indictment.

24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whiskey from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment; or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Michael Heitler.

518 Now comes the defendant, Nathaniel Perlman, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that the defendant, Michael Heitler, was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that the defendant, Michael Heitler, had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize the defendant, Michael Heitler, as a "Shylock," thereby permitting the prosecuting attorney to arouse passion and prejudice in the minds of the jury against this defendant because of his race.

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

5. The court erred in sustaining the objection of the government to questions asked the witness Greengaard by this defendant relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicating liquor.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by the witness McCann that the witnesses Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

519 8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy and his associates or the defendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only

so far as the connections or story of the said individuals tended to establish the guilt or innocence of the defendants.

11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government witnesses were the conspirators and not this defendant and the other defendants.

12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to support the contentions of the government without, at the same time, sufficiently placing before the jury the evidence which tended to support the contentions of this defendant.

13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant a continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

520 17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were know- to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition Law, unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whiskey to be secured at Hobbs, Kentucky and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

521 23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whiskey without a permit in manner and form as is charged in the indictment; to transport the said whiskey for beverage purposes in manner and form as is charged in the indictment; to possess the said whiskey for sale for beverage purposes in manner and form as is charged in the indictment; and to sell the said whiskey for beverage purposes in manner and form as is charged in the indictment.

24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whiskey from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a consipator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment; or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

522 29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Nathaniel Perlman.

Now comes the defendant, Mandel Greenberg, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that the defendant, Michael Heitler, was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that the defendant, Michael Heitler, had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize the defendant, Michael Heitler, as a "Shylock," thereby permitting the prosecuting attorney to arouse passion and prejudice in the minds of the jury against this defendant because of his race.

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

5. The court erred in sustaining the objection of the government to questions asked the witness Greengaard by this defendant relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy
523 and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicating liquor.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by the witness McCann that the witnesses Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy and his associates or the defendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only

so far as the connection or story of the said individuals tended to establish the guilt or innocense of the defendants.

11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government witnesses were the conspirators and not this defendant and the other defendants.

12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to support the contentions of the government without, at the same time, sufficiently placing before the jury the evidence which tended to support the contentions of this defendant.

524 13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant a continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were know- to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition Law, unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whiskey to be secured at Hobbs, Kentucky and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

525 21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant,

at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, towit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whiskey without a permit in manner and form as is charged in the indictment; to transport the said whiskey for beverage purposes in manner and form as is charged in the indictment; to possess the said whiskey for sale for beverage purposes in manner and form as is charged in the indictment; and to sell the said whiskey for beverage purposes in manner and form as is charged in the indictment.

24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whiskey from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts
526 charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment; or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Mandel Greenberg.

Now comes the defendant, Frank McCann, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court for a new trial and for cause thereof says:

1. The court erred in not sufficiently charging the jury to disregard the remark of the prosecuting attorney that the defendant Michael Heitler was a "king of the underworld, who, by the snap of his finger holds the lives of men in his grasp."

2. The court erred in not sustaining the objection of this defendant to the statement of the prosecuting attorney that the defendant Michael Heitler had pleaded guilty to, and been convicted under, an indictment charging a violation of the White Slave or Mann Act.

3. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to characterize the defendant,
527 Michael Heitler, as a "Shylock," thereby permitting the prosecuting attorney to arouse passion and prejudice in the minds of the jury against this defendant.

4. The court erred in permitting the prosecuting attorney, over the objection of this defendant, to misstate the evidence in the case.

5. The court erred in sustaining the objection of the government to questions asked the witness Greengaard by this defendant relative to promises of immunity.

6. The court erred in sustaining objections of the government to questions asked of the witnesses Morris Frank, Maurice Joy and Albert Greenwald, which questions were designed to disclose the fact that the said witnesses were engaged in the illicit traffic of intoxicating liquors.

7. The court erred in sustaining the objection of the government to the defendant's offer of proof to show by his testimony that the witnesses, Maurice Joy and John Miller were engaged in the illicit traffic of intoxicating liquor.

8. The court erred in sustaining the objection of the government to offers of proof made by the defendant, which offers were designed to show that the said Maurice Joy, John Miller, Morris Frank and other government witnesses were the persons guilty of the conspiracy charged in the indictment herein and that this defendant was not guilty thereof.

9. The court erred in sustaining the objection of the government to questions put to the witness Joy by this defendant, which questions were designed to disclose the fact that the witness Joy was protecting others and which questions had a material bearing upon whether or not the witness Joy had his associates or the defendants were the conspirators.

10. The court erred in charging the jury that the jury should concern itself with individuals not named in the indictment only so far as the connection or story of the said individuals tended to establish the guilt or innocence of the defendants.

528 11. The court erred in declining to charge the jury that one of the defenses of this defendant was that the government witnesses were the conspirators and not this defendant and the other defendants.

12. The court erred in putting questions to the jury which tended to correlate and place before the jury the evidence tending to support the contentions of the government without, at the same time, sufficiently placing before the jury the evidence which tended to support the contentions of this defendant.

13. The court erred in admitting in rebuttal the testimony of the witnesses Moore and Todd.

14. The court erred in not granting to this defendant *a* continuance to enable him to investigate the truth of the testimony of the witnesses Moore and Todd.

15. The court erred in instructing the jury that the jury would be required to scrutinize closely, not to reject, the testimony of an accomplice.

16. The court erred in not giving the instruction requested by this defendant relative to the testimony of accomplices.

17. The court erred in sustaining the objection of the government to the proof offered by this defendant to show that the government witnesses, and in particular, the witness Maurice Joy, were known by name to the grand jurors and were known to them, the grand jurors, to be co-conspirators, if any conspiracy there was, and that the said witnesses were such co-conspirators and were not unknown to the grand jury as was charged in the indictment.

18. The court erred in not giving the instruction requested by this defendant, which instruction described the said conspiracy.

19. The court erred in charging the jury that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition Law, unless the jury should find that such possession or such sale was for medicinal purposes or sacramental uses.

529 20. The court erred in charging the jury that the conspiracy was one to cause a certain carload of whiskey to be secured at Hobbs, Kentucky and to be shipped to Chicago, Illinois, under an alleged government permit and to be unloaded in Chicago and distributed to persons who were not, under the law, entitled to receive the same.

21. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that the conspiracy, if any, was the conspiracy charged in the indictment.

22. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as

is charged in the indictment, in that there is no evidence that the conspiracy, if any, was one to transport, sell, or possess for sale, intoxicating liquor, to wit, whiskey, for beverage purposes as distinguished from any other purpose or purposes.

23. The court should grant this defendant a new trial for the reason that the evidence adduced fails to prove that this defendant, at any time, was a party to, or member of, any such conspiracy as is charged in the indictment, in that there is no evidence that the said defendant or any of his alleged co-conspirators agreed, intended or conspired to purchase the said whiskey without a permit in manner and form as is charged in the indictment; to transport the said whiskey for beverage purposes in manner and form as is charged in the indictment; to possess the said whiskey for sale for beverage purposes in manner and form as is charged in the indictment; and to sell the said whiskey for beverage purposes in manner and form as is charged in the indictment.

530 24. The court erred in qualifying the instruction given at the request of the defendant relative to the charge of unloading the whiskey from the freight car.

25. The court should grant this defendant a new trial because the evidence adduced fails to prove the commission by a conspirator of any one of the overt acts charged in the indictment in manner and form as the same is therein charged.

26. The court should grant the defendant a new trial because the evidence adduced fails to prove that any of the overt acts charged in the indictment to have been acts committed or done to effect the object of the said conspiracy was an act committed or done to effect the object of such conspiracy or combination as is charged in the indictment; or was an act committed or done by this defendant or by any co-conspirator acting in his behalf.

27. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of the government's case.

28. The court erred in not granting the motion of this defendant to direct a verdict as to him at the close of all the evidence.

29. The court should grant the defendant a new trial because the verdict of the jury is contrary to law.

30. The court should grant the defendant a new trial because the verdict of the jury is contrary to the evidence.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Frank McCann.

Thereafter, on the sixth day of May, A. D. 1921, an opinion of the Court was filed in the above entitled cause.

Thereafter, on the twelfth day of May, A. D. 1921, the said motions for a new trial, and each of them, so made by the said defendants, were overruled and denied by the Court:

531 To which rulings of the Court, the said defendants, and each of them, by their respective counsel, then and there duly excepted.

Thereupon, and before sentence, the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, each by their respective counsel, severally moved the Court to arrest the judgment as to each of said defendants, the said motions of the defendants Heitler, Perlman, Greenberg and McCann being in writing and the motion of the defendant Quinn being made orally, the said written motions being in words and figures as follows, to wit:

Now after the verdict against the defendant, Michael Heitler, and before sentence, comes the defendant, Michael Heitler, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

532 4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Michael Heitler.

Now after the verdict against the defendant, Nathaniel Perlman, and before sentence, comes the defendant, Nathaniel Perlman, by Thomas J. Symmes and McCormick, Kirkland, Patterson &

Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and *in* violative the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections
533 thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Nathaniel Perlman.

Now after the verdict against the defendant, Mandel Greenberg, and before sentence, comes the defendant, Mandel Greenberg, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase,

transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth
534 Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Mandel Greenberg.

Now after the verdict against the defendant, Frank McCann, and before sentence, comes the defendant, Frank McCann, by Thomas J. Symmes and McCormick, Kirkland, Patterson & Fleming, his attorneys, and moves the court here to arrest judgment herein and hold for naught the verdict of guilty rendered against him, the said defendant, for the following reasons:

1. The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

2. The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

3. The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

4. The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eight-
535 eenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment.

(Signed) THOMAS J. SYMMES,
McCORMICK, KIRKLAND, PATTERSON & FLEMING,
Attorneys for Frank McCann.

and the said oral motion of the defendant George F. Quinn set up exactly the same grounds and reasons as are set forth in the foregoing written motions in arrest made by his four said co-defendants.

Which said motions in arrest of judgment, and each of them, hav-

ing been duly considered by the Court, were overruled and denied by the Court.

To which rulings of the Court, the said defendants, and each of them, by their respective counsel, then and there duly excepted.

Thereupon, on the twelfth day of May, A. D. 1921, the Court sentenced the defendants Frank McCann, George F. Quinn and William J. Truedel each to pay a fine of Two Thousand Dollars ($2,000.00) in default of the payment of which, to be imprisoned until the same shall be paid.

To which rendering of said judgments and the imposing of said sentences, the said defendants, and each of them, by their respective counsel, then and there duly excepted.

Thereupon, on the seventeenth day of May, A. D. 1921, the Court sentenced the defendants Heitler, Perlman and Greenberg as follows:

1. The defendant Michael Heitler to be imprisoned in the United States penitentiary at Leavenworth for the period of eighteen months, to pay a fine of Ten Thousand Dollars ($10,000.00) and to pay one-third of the costs herein, the sentence to begin from the date of delivery to the warden of the penitentiary.

536 2. The defendant Nathaniel Perlman to be imprisoned in the United States penitentiary at Leavenworth for the period of fifteen months, to pay a fine of Ten Thousand Dollars ($10,000.00) and to pay one-third of the costs herein, the sentence to begin from the date of delivery to the warden of the penitentiary.

3. The defendant Mandel Greenberg to be imprisoned in the United States penitentiary at Leavenworth for the period of one year and a day, to pay a fine of Ten Thousand Dollars ($10,000.00) and to pay one-third of the costs herein, the sentence to begin from the date of delivery to the warden of the penitentiary.

To which rendering of said judgments and the imposing of said sentences, the said defendants, and each of them, then and there duly excepted.

And thereupon and upon the seventeenth day of May, A. D. 1921, the defendants Michael Heitler, Nathaniel Perlman and Mandel Greenberg asked and were granted leave by the Court to present within ninety days from said seventeenth day of May, A. D. 1921, their bill of exceptions to the Court and to the Honorable Evan A. Evans, a Judge of the United States Circuit Court of Appeals for the Seventh Circuit, sitting as a Judge of the District Court, the judge before whom and a jury this cause was tried, to be settled, allowed, filed and made a part of the record herein, according to the law and practice of this Court.

And thereupon and upon the twenty-fifth day of May, A. D. 1921, the said defendants Frank McCann and George F. Quinn asked and were granted leave by the Court to present within ninety days from said twenty-fifth day of May, A. D. 1921, their bill of exceptions to the Court and to the Honorable Evan A. Evans, a Judge of the United States Circuit Court of Appeals for the Seventh Circuit, sitting

537 as a Judge of the District Court, the judge before whom and a jury this cause was tried, to be settled, allowed, filed and made a part of the record herein, according to the law and practice of this Court.

Forasmuch as the matters above set forth do not otherwise appear of record, the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn tender this their joint and several bill of exceptions, and pray that the same may be allowed, settled, signed and sealed by the judge presiding at the trial, to wit, by the said Honorable Evan A. Evans, pursuant to the statute in such case made, to be filed and made a part of the record herein, which is done accordingly this 29th day of September, A. D. 1921, as of the thirteenth day of August, A. D. 1921, which is within the time heretofore granted by the Court for the presenting, signing and filing of the said bill of exceptions herein.

EVAN A. EVANS,
Judge.

The foregoing bill of exceptions was presented this 29th day of September, A. D. 1921, to the said Honorable Evan A. Evans, Judge of the United States Circuit Court of Appeals for the Seventh Circuit, sitting as a Judge of the District Court, by the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn, jointly and severally, in open court, for the approval, signature and seal of the said Honorable Evan A. Evans, Judge.

EVAN A. EVANS,
Judge.

(Endorsed:) Filed Sep. 29, 1921. John H. R. Jamar, Clerk.

Endorsed on cover: File Nos. 28524. N. Illinois D. C. U. S. Term No. 569. Michael Heitler, plaintiff in error, vs. The United States of America. Term No. 570. Nathaniel Perlman, plaintiff in error, vs. The United States of America. Term No. 571. Mandel Greenberg, plaintiff in error, vs. The United States of America. Term No. 572. Frank McCann, plaintiff in error, vs. The United States of America. Term No. 573. George F. Quinn, plaintiff in error, vs. The United States of America. Filed October 5th, 1921. File Nos. 28524, 28525, 28526, 28527, 28528.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

MICHAEL HEITLER, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 185.
NATHANIEL PERLMAN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 186.
MANDEL GREENBERG, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 187.
FRANK MCCANN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 188.
GEORGE F. QUINN, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.	No. 189.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Comes now the Solicitor General of the United States and moves the court to dismiss the above-entitled cases for want of jurisdiction.

18036—22

I.

STATEMENT.

These cases, which involve convictions under an indictment charging a conspiracy to violate the Volstead Act, have been brought direct to this court on writs of error upon the sole ground that the construction or application of the Constitution of the United States is involved.

The assignments of error, so far as pertinent, thus present the question (R. pp. 57 and 58):

> The said District Court erred in denying the motions in arrest of judgment herein on behalf of the said Michael Heitler, Nathaniel Perlman, Michael Greenberg, George F. Quinn, and Frank McCann. The grounds of the said motion in arrest were as follows:
>
> 1. The National Prohibition Act is too vague, indefinite, and ambiguous to be enforced as a criminal statute and is violative of the fifth amendment to the United States Constitution.
>
> 2. The Congress was without authority under the Constitution of the United States and the amendments thereto to enact the said act and sections 3, 6, and 29 of Title II thereof.
>
> 3. The said act and the said sections thereof are violative of the ninth and tenth amendments of the Constitution of the United States in that the said act and the said sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation

thereof and in that the said act and the said sections thereof prohibit the purchase, transportation, sale, and possession for sale of intoxicating liquors for purposes other than beverage purposes.

4. The said act and the said sections thereof are unconstitutional and void in that neither the said act nor the said sections thereof are legislation appropriate to the enforcement of the eighteenth amendment to the Constitution of the United States within the meaning of section 2 of the said amendment.

The crux of the argument based upon said assignments of error is stated as follows in the brief of plaintiffs in error (p. 49):

> The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale, and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale, and transportation, for purposes other than beverage purposes.

II.

ARGUMENT.

The decision of this court in the *National Prohibition Cases*, 253 U. S. 350, fully disposes of the constitutional issues now sought to be raised, and as those cases were decided prior to the allowance of the writs of error in the cases at bar, the dismissal of the latter cases is fully justified.

In the *National Prohibition Cases, supra*, this court said (p. 387):

> 9. The power confided to Congress by that section, while not exclusive, is territorially coextensive with the prohibition of the first section, embraces manufacture and *other intrastate transactions*, as well as importation, exportation, and interstate traffic, and is in nowise dependent on or affected by action or inaction on the part of the several States or any of them.
>
> * * * * *
>
> 11. While recognizing that there are limits beyond which Congress can not go in treating beverages as within its power of enforcement, we think those limits are not transcended by the provision of the Volstead Act (Title II, § 1), wherein liquors containing as much as one-half of 1 per cent of alcohol by volume and fit for use for beverage purposes are treated as within that power. *Jacob Ruppert* v. *Caffey*, 251 U. S. 264.

Moreover, in *Street* v. *Lincoln Safe Deposit Company*, 254 U. S. 88, also decided prior to the allowance of the writs of error in the cases at bar, this court again affirmed the validity of the Volstead Act.

It is now too late to urge that there are grounds of unconstitutionality which this court has heretofore failed to consider, and that therefore the several cases in which this court has sustained the validity of the Volstead Act must now be acknowledged to have been wrongly decided.

It is respectfully submitted the cases at bar present no constitutional question "substantial in character" (*Sugerman v. United States*, 249 U. S. 182, 184), and therefore the cases should be dismissed "for want of jurisdiction."

JAMES M. BECK,
Solicitor General.

JOHN W. H. CREM,
Assistant Attorney General.

HARRY S. RIDGELY,
Attorney.

NOVEMBER, 1922.

Nos. 185, 186, 187, 188 and 189.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

MICHAEL HEITLER, *Plaintiff in Error*
v.
THE UNITED STATES

NATHANIEL PERLMAN, *Plaintiff in Error,*
v.
THE UNITED STATES

MANDEL GREENBERG, *Plaintiff in Error.*
v.
THE UNITED STATES

FRANK McCANN, *Plaintiff in Error,*
v.
THE UNITED STATES

GEORGE F. QUINN, *Plaintiff in Error,*
v.
THE UNITED STATES

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

WEYMOUTH KIRKLAND,
Attorney for Plaintiffs in Error.
ROBERT N. GOLDING,
Of Counsel.

CHAMPLIN LAW PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922.

MICHAEL HEITLER, *Plaintiff in Error*
v.
THE UNITED STATES

NATHANIEL PERLMAN, *Plaintiff in Error,*
v.
THE UNITED STATES

MANDEL GREENBERG, *Plaintiff in Error.*
v.
THE UNITED STATES

FRANK McCANN, *Plaintiff in Error,*
v.
THE UNITED STATES

GEORGE F. QUINN, *Plaintiff in Error,*
v.
THE UNITED STATES

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT IN OPPOSITION TO MOTION TO DISMISS FOR WANT OF JURISDICTION.

In opposition to the motion to dismiss, it is respectfully submitted that this Court has not yet passed upon the constitutional question involved herein. The *National Prohibition Cases* have been fully considered in the brief heretofore filed on behalf of the plaintiffs in error, beginning at page 45 thereof. We shall, therefore, not repeat such comment.

The passages cited from those cases in the suggestions of the learned Solicitor General in support of the motion are not in point. The ninth conclusion of the Court does not specify what intrastate transactions are within the power confided to Congress. We admit that intrastate transactions of manufacture, sale and transportation, for beverage purposes, are within the power confided to Congress. Whether or not intrastate transactions of gift, loan and exchange are within such power remains to be determined. The instant cases involve a decision on this point.

Nowhere in the *National Prohibition Cases* was any consideration given by counsel to the distinction between beverage and non-beverage uses, nor does the decision of the Court bear upon this point. This point is raised for decision, for the first time, in the instant cases.

The learned Solicitor General also cites the case of *Street* v. *Lincoln Safe Deposit Co.* as having decided, adversely to plaintiffs in error, the questions herein involved. In the *Street* case, counsel proceeded upon the theory

First: That the National Prohibition Act did not prohibit the particular kind of possession involved in that case; and

Second: If the Act did prohibit such possession, it was unconstitutional.

The Court decided that the Act did not prohibit such possession, and, therefore, the constitutional point raised was never reached for determination.

It is therefore apparent that neither of the two cases decided by this Court before the suing out of the writs of error herein involved the point raised in the instant cases, that is, that the Act is unconstitutional because it forbids intrastate transactions in intoxicating liquor

other than manufacture, sale and transportation, and because it forbids intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes, i. e., for cooking, medicinal, mechanical, manufacturing purposes, etc.

We submit, without further argument, that this Court has not yet passed upon the constitutional question raised herein.

We further submit that, even if this Court has already passed upon this question, this Court has not decided it so many times that an attempt to raise further objections has become frivolous.

Respectfully submitted,

WEYMOUTH KIRKLAND,
Attorney for Plaintiffs in Error.

ROBERT N. GOLDING,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1922.

No. 185.

MICHAEL HEITLER,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 186.

NATHANIEL PERLMAN,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 187.

MANDEL GREENBERG,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 188.

FRANK McCANN,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

No. 189.

GEORGE F. QUINN,
Plaintiff in Error,

v.

THE UNITED STATES OF AMERICA,
Defendant in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.
HONORABLE EVAN A. EVANS, Circuit Judge, Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

WEYMOUTH KIRKLAND,
ATTORNEY FOR PLAINTIFFS IN ERROR.

ROBERT N. GOLDING,
Of Counsel.

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IN THE

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BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

STATEMENT OF FACTS.

The plaintiffs in error, Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann and George F. Quinn (hereinafter described as defendants) were brought to trial at Chicago, in the Northern District of Illinois, Eastern Division, on the fifteenth day of February, A. D. 1921. They were charged with conspiring with twenty-six named co-defendants and with others to the grand jury unknown to violate the National Prohibition Act, to commit, in short, the offenses of purchasing certain whiskey in Kentucky, transporting it to Chicago, possessing it for sale and selling it in Chicago, all without a permit and for beverage purposes (Rec. 2).

Before the calling of the jury, on motion of the attorney for the United States, Messrs. O'Hara, Wissing, McCaffery, W. McGovern, Cohen and H. Block were dismissed from the case (Rec. 7). Although the record does not show it, it is but fair to disclose that Mr. McGovern was dismissed because of his demise before trial and Mr. Block was dismissed because he had not been apprehended. At various stages of the trial, Messrs. Galvin, Kane, Marner, Wagman, Smale, Knebelkamp, Wathen, Simmons, Judge, McLaughlin, Graham and Gindich were dismissed (Rec. 9-10).

The trial lasted until the seventh day of March, A. D. 1921, at which time the jury retired and the next day returned a verdict whereby the defendants Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann, William Trudel and George F. Quinn were found guilty, and the co-defendants George Hans, William Gorman, James O'Leary, Nicholas Ambrosi, John McGovern

and George F. Callaghan were found not guilty (Rec. 308, 17). The trial court thereafter rendered judgment on the verdict and imposed sentences as follows (Rec. 47-50):

George F. Quinn—a fine of $2,000 without costs.

William J. Trudel—a fine of $2,000 without costs.

Frank McCann—a fine of $2,000 without costs.

Michael Heitler—to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for 18 months and to pay a fine of $10,000, and one-third of the costs.

Nathaniel Perlman—to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for 15 months and to pay a fine of $10,000, and one-third of the costs.

Mandel Greenberg—to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for one year and a day and to pay a fine of $10,000, and one-third of the costs.

We do not intend to burden this Court with a lengthy and involved statement of facts. It is not necessary for the determination of the legal points herein involved for this Court to be familiar with minute details as set forth in the testimony. If, however, the Court cares to take the time to glance over the kind of testimony upon which these defendants were convicted, it will be found in the appendix, at page 161 hereof. The few observations hereinafter stated will, we believe, be helpful to the Court. If we are in error as to any statements made, the government will undoubtedly correct us.

The theory of the government was that Heitler, Perlman and Greenberg caused a certain car of Grand Dad whiskey to be purchased from the distillery at Hobbs, Kentucky, and transported to Gresham Station, Chicago. While the car was in transit these three, assisted by McCann and Quinn, sold the whiskey in one hundred case

lots to many saloonkeepers, among whom were certain co-defendants, and the government witnesses, Joy, Miller, the two Franks and Greengaard. When the car arrived at Gresham Station on October 1, 1920, Heitler, Perlman and Greenberg are supposed to have met it, unloaded it and distributed the whiskey to the purchasers, who had trucks there ready to haul away the liquor. After leaving the car, the trucks belonging to Joy and Miller, the two Franks and Greengaard, were held up and the whiskey stolen. These individuals then accused Heitler of having engineered the holdups and taken the whiskey.

The testimony offered by the government displayed the following characteristics:

(1) No document, or fact established by unprejudiced testimony, exists in the record which even tends to incriminate the defendants; the entire case of the government rests upon the words of approvers.

(2) The approver testimony is replete with contradiction; the approvers not only contradict each other on vital points, but no approver was able to avoid contradicting himself.

(3) The testimony of unprejudiced government witnesses tended to exculpate the defendants.

(4) It is apparent from the record that the approvers were testifying not merely to get immunity, but also to satisfy a personal grudge against the defendants. For instance, Joy admitted on the stand that he was testifying because the defendants would not pay him the money he had lost in the whiskey deal and that if they had paid him the money, he would not have testified (Rec. 132). Parentheticaly, Joy was as prominent during the trial as he was in the whiskey conspiracy before the indictment. When Judge Evans requested Assistant District Attor-

ney Glass to have Joy return to court the next day, Joy assured the learned Judge that it would be all right with him, saying, "Your Honor, I will be here anyhow. I will be here every day" (Rec. 139). He saw the government witness Greenwald before trial and told him to "Jazz the Jews" (Rec. 140) and instructed him as to his testimony, saying, "You know you saw Heitler and them at the car" (Rec. 142). He also, in the office of Assistant District Attorney Glass, tried to influence the testimony of Mr. Ortseifen, a witness for the defense (Rec. 167-8), and produced Todd as a witness in rebuttal, telling him that he, Todd, was lucky in being left out of the case that long, but it had gotten to the point where he had to bring Todd in in order to protect himself (Rec. 274).

The defendants not only denied specifically the incriminating facts testified to by the approvers, but also offered certain alibis (see Appendix, IV), and further offered an affirmative defense, which was as follows: The car of whiskey was purchased in Kentucky and brought to Chicago by Joy and Miller, who sold and distributed the whiskey to the Franks and others. After the approvers had lost their whiskey through the activity of gentlemen of the road, they thought that the defendants, principally Heitler, had engineered the holdups and had taken the whiskey. Then began a noisy and vigorous campaign to blackmail the defendants into paying the approvers the money which the lost whiskey was worth, culminating in a headline story on the first page of the Tribune and an investigation by the government. Now, what was the position of the approvers? Some one brought that whiskey to Chicago on a fraudulent permit—those facts were never denied by the defendants (Rec. 159, 291). When the defendants would not submit to blackmail, the approvers saw a chance to get not only immunity, but also revenge for the supposed robbery, so they accused the defendants of the crime.

From the foregoing statement of ultimate facts, it is apparent that the sole question in the case was, *who committed the crime?* We shall make no attempt to ask this Court to weigh conflicting testimony and shall make but little reference to evidence offered by the defense, as we admit that if credence be given to any one of the numerous and conflicting stories told by the approvers, enough evidence exists in the record to warrant the conviction of the defendants, except as to certain specific defenses hereinafter mentioned. We shall take this record as the government has made it and shall prove by the government witnesses themselves that the theory of the defense is supported by facts, while the theory of the government is supported by nothing but perjury.

We contend that this case was tried, both by the court and the government, upon an erroneous theory, which we shall hereafter show manifested itself at least eleven different times during the trial with resultant error. This erroneous theory was, in brief, that there was no question in the case as to the perpetrators of the crime and that the defendants could not, therefore, urge as a defense the fact that the guilty parties were the government witnesses themselves, and not the defendants. In explaining hereafter how the various errors in the case arose, we do not pretend to point out exhaustively the entire error, but only an outline thereof, in order that this Court may obtain a concise survey of the entire case. That part of the brief devoted to the specification of errors sets forth the errors completely.

When the grand jury returned the indictment, not a word was said therein (Rec. 2) of *Joy*, Miller, the Franks, or other approvers. Here is where the erroneous theory got its start. The grand jury put the approvers in the same class with Koeller, the government's sole unprejudiced witness. The approvers

were not to be tried, no evidence was to be admitted against them—they were merely witnesses. The defendants made two offers of proof to show that a reliance existed between the indictment, which charged that the other conspirators were unknown to the grand jury, and the fact, which was that they were known to have been the approvers (Rec. 129-32, 235-6), offering Joy and a grand juror as witnesses. On objection, the evidence was excluded. We have met the erroneous theory at its inception. So far as concerns the charge presented to the court, the approvers had done nothing, they were mere observers of facts, as was Keller.

The defense tried to inquire into the liquor trade carried on by the approvers and was blocked by the erroneous theory. The learned trial judge, of his own motion, interrupted counsel and stopped further cross-examination of Mickey Frank as to individuals to whom he had sold liquor, saying (Rec. 105):

> "I think you have pursued that far enough. We are not trying that case.—I don't believe we ought to get into foreign issues."

We shall hereafter show this Court that, to all intents and purposes, according to the rules of law governing this particular class of case, the approvers were, in effect, on trial. The sole question before the jury was not, was a crime committed, but who committed it. We do not wish to fall into argument at this point, however, and will merely show how other error manifested itself.

The learned trial court sustained objection to the question asked of the approver Joy on cross-examination (Rec. 131), to-wit:

> "Did you have anything to do with the carload of whiskey that Miller got in January?"

The learned trial court, on objection by the government, refused to receive evidence, offered as part of the

defendants' case, that Miller had, in fact, received a carload of liquor (Rec. 232-3). The learned trial court also sustained objection to questions asked of Joy on cross-examination relative to persons to whom he had sold the liquor in question (Rec. 135-6). Here, we shall hereafter show, was material evidence bearing upon the question of who committed the crime. Our position is, that if the defense had been permitted to show that Miller had had a carload of Grand Dad whiskey before this one; that Joy, Miller and the Franks were wholesale dealers in illicit liquor, instead of mere casual vendors thereof, the probabilities were that they had brought this car to Chicago, and not the defendants, whose only liquor activities appear in connection with, and from the mouths of, the approvers. The learned trial court, on objection, refused to admit evidence offered by the defense to show that Joy had attempted to tamper with a witness (Rec. 168), evidence which we will hereafter show was material and competent.

When the learned trial court charged the jury, it refused to distinguish sharply between approvers as witnesses and honest, unprejudiced men as witnesses. Joy, whose freedom depended upon making the jury believe his story, was not sufficiently differentiated from Koeller, who was merely a narrator of events as he saw them, with no interest in the case. The affirmative instruction given (Rec. 298) was to the effect that the testimony of approvers, while not entitled to the same weight as that of an innocent party, was to be scrutinized carefully, not rejected, only cautiously accepted, and that one approver could corroborate another. The refused instruction (Rec. 307), we shall hereafter show, properly stated the law as applicable to this case.

Another error arose in the course of the trial, which was a direct result of the fact that the real issue was the

identity of the guilty parties. The indictment charged a conspiracy to commit four specified crimes and the trial court should have charged the jury that such was the case, describing the crimes accurately. Instead, the learned trial court charged, most informally, that the conspiracy charged was one to bring the liquor to Chicago and distribute it (Rec. 292-3, 294). In its opinion, the learned court said that it thus charged because the existence of the conspiracy was admitted (Rec. 39). Precisely. But the net result is, the defendants were thus deprived of a valid, technical defense, while at the same time, they were not permitted to take advantage of their real, substantial defense. This specific defense was, however, called to the attention of the court by motions to direct a verdict, being points 8 and 10 thereof, and by motions for a new trial, all of which were overruled (Rec. 11, 13, 14, 16, 20, 23, 26-7, 30, 41).

The erroneous theory, which we have seen woven through this entire case, culminated in what amounted to a directed verdict against the defendants. Notwithstanding the fact that the sole question in this case was whether Joy or Heitler had brought the car to Chicago and had sold the liquor, the learned trial court declined to charge the jury that the theory of the defense was that the approvers were the guilty parties and that the jury should consider them to the extent of determining whether they or the defendants were guilty (Rec. 302). Not only that, but the learned court went further and affirmatively charged the jury that they should not concern themselves with individuals not named in the indictment (Rec. 295). On the instructions of the court, what could the jury do, but return a verdict of guilty? *They were not permitted to determine the sole question in the case—Joy or Heitler, which?*

The defendants also contended that the evidence did not prove the commission of any one of the five overt acts charged in the indictment. This point was called to the attention of the learned trial court by motions to direct a verdict (Rec. 160, 282-7), by defendants' requested instruction "B" (Rec. 306) and by motions for a new trial. being point 25 thereof (Rec. 21, 24, 27, 31).

The defendants also presented for consideration the specific defense that the evidence did not prove the crime charged for the reason that, the indictment having charged a conspiracy to commit four offenses, the proof must show that the object was, in fact, the commission of those four offenses. This was presented by motions to direct a verdict, being points 8-10 thereof (Rec. 11-2, 13, 14-15, 16) and by motions for a new trial, being points 22 and 23 thereof (Rec. 20, 23, 27, 30).

The defendants also objected to the inflammatory remarks to the jury made by Assistant District Attorney Kelly during argument (Rec. 287-90) and urged the point in motions for a new trial, being points 1-4 thereof (Rec. 18, 21-2, 25, 28-9).

The constitutional point was specifically raised by motions to arrest the judgment (Rec. 42, 43, 44, 45), the motion of Quinn being made orally, but setting up the same grounds (Rec. 323).

Were it not for the fact that the record raises certain specific defenses which have never been before this Court for decision, and upon which the defendants should have a decision, we would be willing to rest our case upon the fact that the defendants did not receive a fair trial, due to the fact that the learned trial court applied an erroneous theory which blocked the defendants in presenting to the jury the only fact in issue so far as the jury was concerned.

SPECIFICATION OF ERRORS.

(*Arranged according to points*)

Point I.

This point does not specify error.

Point II.

The National Prohibition Act is unconstitutional.

The court erred in overruling defendants' motions in arrest of judgment, which said motions specified the grounds thereof as follows (Rec. 42-45, 323):

"The National Prohibition Act is too vague, indefinite and ambiguous to be enforced as a criminal statute and is violative of the Fifth Amendment to the United States Constitution.

The Congress was without authority under the Constitution of the United States and the Amendments thereto to enact the said Act and Sections 3, 6 and 29 of Title II thereof.

The said Act and the said Sections thereof are violative of the Ninth and Tenth Amendments of the Constitution of the United States in that the said Act and the said Sections thereof prohibit transactions in intoxicating liquors other than the manufacture, sale, transportation, importation, and exportation thereof and in that the said Act and the said Sections thereof prohibit the purchase, transportation, sale and possession for sale of intoxicating liquors for purposes other than beverage purposes.

The said Act and the said Sections thereof are unconstitutional and void in that neither the said Act nor the said Sections thereof are legislation appropriate to the enforcement of the Eighteenth Amendment to the Constitution of the United States within the meaning of Section 2 of the said Amendment."

Point III.

Errors predicated upon the erroneous theory of the case entertained by the learned trial court.

1. The court erred in preventing, of its own motion, further cross-examination of the approver Mickey Frank with respect to individuals to whom said Frank had sold liquor (Rec. 105).

2. The court erred in sustaining the objection of the government to the following question asked of the approver Joy:

   "Did you have anything to do with the carload of whiskey that Miller got in January or February?" (Rec. 131.)

3. The court erred in excluding evidence to prove that the approver Miller had a carload of Grand Dad whiskey in February, 1920, and that he had disposed of it, the ruling of the court being on the ultimate fact and not on any particular piece of evidence. (Rec. 232-3.)

4. The court erred in excluding evidence offered by the defendants to prove that Joy and Miller had been in other liquor deals between the effective date of the Prohibition Act and October 1st, 1920, the ruling of the court being on the ultimate fact and not on any particular piece of evidence (Rec. 233).

5. The court erred in sustaining the objection of the government to the line of cross-examination directed to the approver Joy, designed to elicit from him information as to the individuals to whom he had sold liquor in the course of the present conspiracy, the ruling of the court being on the ultimate fact and not on the questions themselves (Rec. 135-6).

6. The court erred in declining to give defendants' requested instruction "C," which was as follows (Rec. 307):

"The court instructs the jury that certain witnesses who have testified for the government—that is, the witnesses Morris Frank, Harry Frank, Louis Greengaard, John Fitzpatrick, John Miller and Maurice Joy—may be found by the jury to be accomplices. Accomplices are those who upon their own confession stand contaminated with guilt and admit participation in the very crime which they endeavor, by their testimony, to fix upon the defendants. If the jury find that any witness is such an accomplice, then the court further instructs the jury that an accomplice is an admissible witness, and a conviction may be had on the uncorroborated testimony of such a witness if the story as told is straightforward and has a ring of truth and indicates unequivocally the guilt of the defendants, but the jury are cautioned and advised to weigh carefully such testimony, to take into consideration the inducements or temptations which might prompt such a witness to testify falsely, to consider the feeling or interest and the general demeanor of such a witness on the stand. And finally, the jury are advised not to convict on the testimony of an accomplice unless corroborated by other testimony of an untainted character or by material facts established by independent evidence.

Corroboration, within the meaning of this rule, means such support given to the accomplice's testimony as tends to establish the truth of that portion of his testimony which connects the defendants with the crime. It is not sufficient that some testimony may be found to establish a fact or circumstance testified to by an accomplice. The supporting testimony must also corroborate on the matter of guilt. It must have a tendency to prove what the accomplice's testimony, standing alone, was intended to prove."

7. The court erred in charging the jury on accomplice testimony as follows (Rec. 298):

"Certain of the Government's witnesses have

been called accomplices. They are witnesses who admit that they are parties to the crime charged in the indictment. Their testimony should be scrutinized closely to ascertain whether they are influenced or not by any hope of immunity or by any other unworthy motive. Admitting their own guilt, their testimony is not entitled to the same weight as the testimony of an innocent party.

But the fact that certain witnesses who have testified may be accomplices, or that the defendants are interested in the outcome will not justify you in rejecting their testimony on that ground alone.

Let me refer again to an imaginary case by way of illustration, to aid you in determining what weight might be given to the testimony of an accomplice. Assume, if you will that A and B are indicted and on trial for entering the house of X in the night time and with the intent to burglarize it. C appears as a witness and states that he was with A and B on the night in question and all three of them broke into the house of X and took therefrom moneys, jewelry and bonds. Now, C's testimony shows him to be a confessed accomplice. The jury would therefore approach his testimony with some caution. They would be required to scrutinize it closely, not reject it, but scrutinize it carefully, and only cautiously accept it.

Now, assume that there is other testimony,—that X testified that he and his family left home early that evening, and returned home early the next morning, and found their house had been burglarized and that moneys, jewelry and bonds had been taken and the description of the goods taken corresponded with C's testimony. There would be corroboration of C's testimony.

Now, assume further that another witness testified that he saw the three, A, B, and C together at a place and at an hour quite unusual and yet consistent with C's entire story. In such a case, the corroboration of details in C's story might make C's testimony most persuasive of the truth."

8. The court erred in declining the oral request of the defendants to charge the jury that the theory of the

defense was that the conspiracy to buy, transport and sell the whiskey in question was a conspiracy on the part of Joy and other government witnesses and that the jury should consider Joy, Miller and others to the extent of determining whether they or the defendants were the conspirators (Rec. 302).

9. The court erred in declining to admit evidence offered by the defense to show that the approver Joy, in the office of Assistant United States Attorney Glass, tried to influence the testimony of George Ortseifen, the ruling of the court being on the ultimate fact and not on any particular piece of evidence (Rec. 167-8).

10. The court erred in sustaining the objection of the government to, and in declining to receive, the evidence offered by the defendants to show a variance between the indictment and the fact, to-wit, evidence to prove that the approvers were known to the grand jury to have been conspirators and were not unknown, the ruling of the court being on the ultimate fact and not on any particular piece of evidence (Rec. 129-31, 233-4).

11. The court erred in charging the jury as follows (Rec. 292-3, 294):

"In this case, the government charges the defendants with having conspired to violate the National Prohibition law. Without going into details, let me say the National Prohibition Law provides that 'No person shall, on or after the date when the Eighteenth Amendment of the United States Constitution goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as provided in this act.'

In general it may be said that the law prohibits dealing in intoxicating liquor or shipping intoxicat-

ing liquor excepting for medicinal purposes or for sacramental uses, and for these uses permits must be issued by the duly constituted agencies of the government. It was therefore unlawful to ship whiskey from Louisville, Kentucky, to Chicago, without a lawful permit. It was unlawful to sell this liquor and unlawful for any individual to have this liquor in his possession unless it was for medicinal or sacramental uses.

I charge you that the shipment of the liquor to Chicago was illegal and its sale or possession in Chicago was illegal and in violation of the National Prohibition law, unless you find that such possession or such sale was for medicinal purposes or sacramental uses.

You should therefore, early direct your attention to this question: Was there a conspiracy to thus violate the National Prohibition Law?

Now, briefly stated, the government claims that the evidence tends to establish that certain individuals formed a conspiracy to violate the National Prohibition Law by causing a certain carload of whiskey to be secured at Hobbs, Kentucky, and to be shipped to Chicago, Illinois, under an alleged government permit, and to be unloaded in Chicago and distributed to persons who were not under the law entitled to receive the same."

Point IV.

The evidence does not prove the commission of any one of the overt acts charged in the indictment.

1. The court erred in declining to direct a verdict of not guilty on the respective motions of the defendants made at the close of the evidence for the United States (Rec. 160) and at the close of all the evidence in the case (Rec. 282-7), the point being raised by paragraphs 5 and 6 of said latter motions.

2. The court, after instructing the jury, at the request of the defendants, as follows (Rec. 306):

"The court instructs the jury that before any defendant can be convicted, the evidence must show beyond a reasonable doubt that a conspiracy existed as charged in the indictment, and that, at least one of overt acts charged in the indictment was done by a conspirator to effect the object or end of this conspiracy. By the dismissal from this case of Morris H. Gindich, O. H. Wathen, and W. F. Knebelcamp, the second and third overt acts are removed from consideration as overt acts done by a conspirator. To warrant a conviction of any defendant, the jury must not only be convinced that a conspiracy existed as charged in the indictment, but the jury must also be convinced beyond a reasonable doubt that, in order to effect the object of the said conspiracy, either * * *

Or Third; that Michael Heitler, Nathaniel Perlman and Mandel Greenberg were conspirators and that they, or one or two of them, on October 1, 1920, were not only present at Gresham Station, but also unloaded the whiskey from the freight car,"

erred in qualifying the charge as follows (Rec. 306):

"I want to say with reference to that last that it does not have to be shown that they personally picked up the cases and carried them out. They could have participated in unloading the freight car without personally having carried out the goods."

3. The court erred in declining to grant a new trial on the respective motions of the defendants (Rec. 309-21), the point being raised by paragraphs 25 and 26 of said motions.

Point V.

The remarks of counsel for the United States, in argument to the jury, constitute reversible error.

The remarks of counsel were as follows (Rec. 287, 288, 289, 290):

"Now, we will take the case of Mandel Greenberg. We have shown by the testimony of Mossy Joy, and Miller, and Moore, that Mandel Greenberg was one of the Big Three in this conspiracy, notwithstanding the fact that Mandel Greenberg presented a framed alibi for the consideration of this jury.

If you have any tears, prepare to shed them now, Mike Heitler is ascending the witness stand. With measured tread and downcast eyes, Mike walks to the chair. You would think that Mike was going to the electric chair, he is so shocked. In answering questions of his counsel, he is meek and humble, 'Yes, sir; no sir.'

Why, it is not the same man that threatened Morris Frank with death in the Englewood Station. It is not the same King of the Underworld, who, by the snap of his finger, holds the lives of men in his grasp.

Mike is true to his type, yellow, when he is cornered, resorting to any means to get out of a tight place.

If all the tears that Mike caused were gathered in one reservoir, Mike Heitler could swim in it.

Mike was playing a part when he sat in this witness chair. He is a great actor. He wanted to impress and show you how meek and humble he is.

How much like Shylock Mike looked. He demanded his pound of flesh and he bled his victims—

The evidence shows here that Mossy Joy got back his diamonds, his stickpin and his ring, and he got them back after he made this demand on Heitler.

Now, if Heitler had nothing to do with this, how could Heitler have gotten him back his diamond ring and his stickpin?"

Point VI.

The evidence does not prove a conspiracy to commit the four crimes charged as the object thereof.

1. The court erred in declining to direct a verdict of not guilty on the respective motions of the defendants made at the close of the evidence for the United States (Rec. 160) and at the close of all the evidence in the case (Rec. 282-7), the point being raised by paragraphs 2 and 10 of said latter motions.

2. The court erred in declining to grant a new trial on the respective motions of the defendants (Rec. 309-21), the point being raised by paragraph 23 of said motions.

BRIEF OF ARGUMENT.

Point I.

The writs of error were not taken frivolously.

Point II.

The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes.

Point III.

Errors predicated upon the fact that the trial court entertained an erroneous theory of the case, resulting from a failure to appreciate that the question of fact in the case was limited to the identity of the perpetrators of an admitted crime.

Point IV.

The evidence does not prove the commission of any one of the overt acts alleged in the indictment.

Point V.

The remarks of counsel for the government during argument constitute reversible error.

Point VI.

There is no evidence in the record to prove the crime as charged, to-wit, a conspiracy to commit all four offenses charged as having been the object thereof.

Point I.

The writs of error were not taken frivolously.

I.

The defendants contend that the National Probihition Act is unconstitutional.

Analysis of the Act, showing the prohibitions thereof.

II.

This Court has not yet passed upon the constitutional point raised herein.

Consideration of the *National Prohibition Cases,* 253 U. S. 350.

Point II.

The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes.

I.

Before the adoption of Amendment XVIII all police power over intrastate transactions in intoxicating liquor was vested solely in the several states.

A. The police power generally is possessed by the states.

Re Heff, 197 U. S. 488, 505, 506.

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156.

B. The police power is not only the power to enact legislation, but is also the power to refrain from enacting legislation.

Richards v. *Palace Laundry Co.*, 55 Utah 409, 186 Pac. 439.

Hammer v. *Dagenhart*, 247 U. S. 251, 273.

Robbins v. *Taxing District*, 120 U. S. 489, 493.

12 C. J. 909.

(See argument.)

II.

Amendment XVIII prohibits merely the manufacture, sale, transportation, importation and exportation of intoxicating liquor for beverage purposes and does not prohibit, nor grant the power to Congress to prohibit, any transaction in intoxicating liquor except the foregoing five, and does not prohibit, nor grant the power to Congress to prohibit, those five transactions when done for any purpose other than beverage purpose.

A. Section 1 of Amendment XVIII should be restricted to the natural meaning of the words used therein.

Lake County v. *Rollins*, 130 U. S. 662, 670.

Commonwealth v. *Campbell*, 133 Ky. 50, 117 S. W. 383.

The amendment is the first attempt to limit by a constitutional provision the use and enjoyment of previously acquired property,

Slaughter-House Cases, 16 Wall. 36, 68.

Texas v. *White*, 7 Wall. 700, 728,

and infringes, for the first time, upon the hitherto plenary and exclusive police power of the states.

Barbier v. *Connolly*, 113 U. S. 27, 31.

Every intendment is against divesting a state of any right.

U. S. v. *Herron*, 20 Wall. 251, 263.

B. Section 1 prohibits merely the said transactions when done for a specific, *i. e.*, beverage purpose.

The provisions of the section are self-executing.

National Prohibition Cases, 253 U. S. 350.
Civil Rights Cases, 109 U. S. 3.
Hodges v. *U. S.*, 203 U. S. 1.
Guinn v. *U. S.*, 238 U. S. 347.

A prohibition on sale does not include a prohibition on gift or other act of transfer,

Holley v. *State*, 14 Tex. Cr. App. 505.
Gillan v. *State*, 47 Ark. 555.
Bailey v. *U. S.* (C. C. A.) 267 Fed. 559.
State v. *Davis*, 130 Ala. 148, 30 So. 344.
Skinner v. *State*, 97 Ga. 690, 25 S. E. 364.
Keiser v. *State*, 82 Ind. 379.
State v. *Hutchins*, 74 Ia. 20, 36 N. W. 775.
State v. *Standish*, 37 Kan. 643, 16 Pac. 66.
Commonwealth v. *Abbott*, 147 Ky. 686.
Commonwealth v. *Packard*, 71 Mass. 101.
Jones v. *State*, 108 Miss. 530, 66 So. 987.
Green v. *Certain Liquors* (App. Div.) 160 N. Y. S. 126.
Wood v. *Territory*, 1 Ore. 223.
State ex rel. Columbia Club v. *McMaster*, 35 S. C. 1, 14 S. E. 290.
State v. *Cooper*, 26 W. Va. 338.

State v. *Fulks*, 207 Mo. 26, 105 S. W. 733.
Klein v. *Livingstone Club*, 177 Pa. St. 224, 35 Atl. 606,

nor does it include a prohibition on purchase.

Whitmore v. *State*, 72 Ark. 14, 77 S. W. 598.
Phillips v. *State* (Tex. Cr. App.) 40 S. W. 270.
Candill v. *Commonwealth*, 140 Ky. 556, 131 S. W. 386.
Lindsey v. *State* (Ark.) 219 S. W. 1024.
Hiers v. *State*, 52 Fla. 25, 41 So. 881.
Dial v. *State*, 159 Ala. 66, 49 So. 230.
People v. *Tart*, 169 Mich. 586, 135 N. W. 307.

Since "beverage purposes" means for the pleasure of drinking,

Commonwealth v. *Mandeville*, 142 Mass. 469, 8 N. E. 327,

an expressed prohibition on such purpose does not include non-beverage purposes.

State v. *Langdon*, 29 Minn. 393, 13 N. W. 187.
Rabe v. *State*, 39 Ark. 204.
Town of Selma v. *Brewer*, 9 Cal. App. 70, 98 Pac. 61.
Prowitt v. *City of Denver*, 11 Colo. App. 70, 52 Pac. 286.
Turner v. *Mayor of Forsyth*, 78 Ga. 683, 3 S. E. 649.
City of Carthage v. *Carlton*, 99 Ill. App. 338.
Donnell v. *State*, 2 Ind. 658.
Payne v. *State*, 74 Ind. 203.
State v. *Courtney*, 73 Ia. 619, 35 N. W. 685.
Commonwealth v. *Reynolds*, 89 Ky. 147.
People v. *Sharrar*, 164 Mich. 267, 130 N. W. 693.
King v. *State*, 58 Miss. 737.
State v. *Wray*, 72 N. C. 253.

Gue v. *City of Eugene*, 53 Ore. 282, 100 Pac. 254.
State v. *Billups*, 63 Ore. 277, 127 Pac. 686.
State v. *Dunning*, 14 S. D. 316.
Atkinson v. *State*, 46 Tex. Cr. R. 229, 79 S. W. 31.
Russell v. *Sloan*, 33 Vt. 656.
State v. *Bluefield Drug Co.*, 43 W. Va. 144, 27 S. E. 350.
Adams Express Co. v. *Kentucky*, 238 U. S. 190.

C. Section 2 grants a mere power of enforcement to Congress which cannot be used to extend the terms of Section 1; any such attempted extension is unconstitutional.

Notwithstanding the adoption of the amendment, the United States still remains a government of enumerated powers.

Hodges v. *U. S.* 203 U. S. 1, 16.

Legislation which seeks to extend the scope of self-executing prohibitions is not "appropriate" to the enforcement thereof.

Slaughter-House Cases, 16 Wall. 36.
U. S. v. *Cruikshank*, 2 Otto 542.
Civil Rights Cases, 109 U. S. 3.

The theory of implied or ancillary powers is not applicable to a power of enforcement.

(See argument.)

Even if it were, the limits are set by the original power and the ancillary power cannot be used to extend them.

Keller v. *U. S.*, 213 U. S. 138, 144.
Hammer v. *Dagenhart*, 247 U. S. 251, 273.
Bailey v. *Drexel Furniture Co.*, No. 657.

Assuming, however, that Congress has, by some means, known or unknown, acquired power to legislate in the entire field, the prohibition on non-beverage purposes is unconstitutional, since a non-beverage use not only has no tendency to result in a beverage use, but, in fact, makes such a use physically impossible.

City of Jacksonville v. *Chicago & Alton R. Co.*, 274 Ill. 152, 113 N. E. 91.

Eidge v. *City of Bessemer*, 164 Ala. 599, 51 So. 246.

City of Shreveport v. *Hill*, 134 La. 351, 64 So. 137.

City of Roswell v. *Eastern Ry. Co.*, 16 N. M. 685, 120 Pac. 303.

(See argument.)

III.

The National Prohibition Act, being unconstitutional, cannot be saved by striking out objectionable parts or by inserting limitations.

The statute, as it now stands, is valid legislation as to the District of Columbia, the territories and the Indian country

(See argument),

for the reason that the power of Congress is original as to

(a) District of Columbia

Loughborough v. *Blake*, 5 Wheat. 317,

(b) Territories

Binns v. *U. S.*, 194 U. S. 486,

(c) Indian country

Perrin v. *U. S.*, 232 U. S. 478.

The Court cannot and will not go through a statute with shears and paste and create a new act out of an old,

Employers' Liability Cases, 207 U. S. 463, 501,
U. S. v. *Reese,* 2 Otto 214,

nor should the Court do so if it could, since Congress has not pretended to keep within the enforcement power granted by the amendment.

James v. *Bowman,* 190 U. S. 127, 139.
(See argument).

A proper interpretation of this Act will restrict its operation to the District of Columbia, the territories and the Indian country.

U. S. v. *Dewitt,* 9 Wall. 41.

Point III.

Errors predicated upon the fact that the trial court entertained an erroneous theory of the case, resulting from a failure to appreciate that the question of fact in the case was limited to the identity of the perpetrators of an admitted crime.

I.

The case was tried on the wrong theory.
(See argument).

II.

The case should have been tried on the theory that Joy, *et al.,* were, in effect, on trial to the same extent as the defendants, and the defendants should have been permitted to prove that the approvers were the real culprits.

A. The theory of the defense was that Joy and the rest of the approvers were the guilty parties and were trying to shift the crime onto the defendants.
(See argument).

B. The facts in the record, as made by the government, support the theory of the defense.

(See argument).

C. The case was, therefore, such that the approvers as well as the defendants were on trial.

Harper v. *State,* 185 Ind. 322, 114 N. E. 4.
Kelley v. *State,* (Tex. Cr. App.) 216 S. W. 188.
Mandosa v. *State* (Tex. Cr.) 225 S. W. 169.
Ex parte Gilstrap, 14 Tex. App. 240.

III.

The excluded evidence should have been admitted because it tended to prove that the approvers, and not the defendants, were the real culprits.

A fact to be relevant and admissible need not be of high probative value.

1 Wigmore on Evidence, § 29.
Interstate Com. Com. v. *Baird,* 194 U. S. 25, 44.

A fact is relevant and admissible if, taken in connection with other admitted facts, or with an offer of proof of other facts, it tends to incriminate another and exculpate the defendants.

People v. *Myers,* 70 Cal. 582, 584, 12 Pac. 719, 720.
McDonald v. *State,* 165 Ala. 85, 89, 51 So. 629, 631.

The ultimate facts sought to be proved did more than to show mere motive or opportunity or participation on the part of a third person.

(See argument.)

The weight of the excluded evidence was for the jury, not the court.

State v. *Harris,* 153 Ia. 592, 133 N. W. 1078.

IV.

The defendants were entitled to a charge presenting to the jury their theory of the case and the trial court erred in refusing such requested charge.

Stevenson v. *U. S.*, 162 U. S. 313, 323.
Bird v. *U. S.*, 180 U. S. 356, 361.
Hendrey v. *U. S.* (C. C. A.) 233 Fed. 5, 18.
State v. *Gallivan*, 75 Conn. 326, 333, 53 Atl. 731, 733.
Payton v. *State*, 4 Okl. Cr. 316, 111 Pac. 666.
Hall v. *State*, 69 Tex. Cr. R. 332, 153 S. W. 902.

The error is most serious when the court has charged on the theory of the government,

Francis v. *State* (Tex. Cr. App.) 55 S. W. 488,

for justice and the law demand that the court also refer to facts favorable to the defense.

Allison v. *U. S.*, 160 U. S. 203, 212.

V.

The court erred in giving the instruction on accomplice testimony and in declining to give requested instruction "C" on accomplice testimony.

A. The instruction given was erroneous in that it failed to advise the jury against convicting unless corroboration was found in untainted testimony; the instruction refused contained a correct statement of the law .

It is the duty of the court to advise the jury not to convict upon the uncorroborated testimony of an accomplice.

Reagen v. *U. S.*, 157 U. S. 301, 310.

Freed v. *U. S.* (App. D. C.) 266 Fed. 1012.
McGinniss v. *U. S.* (C. C. A.) 256 Fed. 621.
People v. *Aiello,* 302 Ill. 518.

The *Caminetti* case has not changed the rule. (See argument).

B. The instruction given was also erroneous in that it failed to state correctly the rule of corroboration, said instruction permitting the jury to find corroboration in the testimony of fellow approvers and in other testimony not corroborative as to guilt; the instruction refused properly stated the law.

The crime itself cannot be corroborating evidence as to who committed it.

Sykes v. *U. S.* (C. C. A.) 204 Fed. 909.
McNealley v. *State,* 5 Wyo. 59, 36 Pac. 824.

One approver cannot corroborate another.

Jones v. *Commonwealth,* 111 Va. 862, 868, 69 S. E. 953, 955.
U. S. v. *Hinz,* 35 Fed. 272, 281.
Ratcliff v. *State* (Tex. Cr. App.) 229 S. W. 857.
16 C. J. 710, § 1453.

The corroboration must be as to guilt.

Sykes v. *U. S.* (C. C. A.) 204 Fed. 909, 913.
Jones v. *Commonwealth,* 111 Va. 862, 869, 69 S. E. 953, 955.
Smith v. *State,* 10 Wyo. 157, 166, 67 Pac. 977, 979.
Howard v. *Commonwealth,* 110 Ky. 356, 361, 61 S. W. 756, 758.
Clapp v. *State,* 94 Tenn. 186, 195, 30 S. W. 214, 216.
Courson v. *State,* (Ga. App.) 94 S. E. 53, 54.
3 Russell on Crimes (7th ed.) 2288.
16 C. J. 701, § 1434.

Corroboration or no is tested by eliminating the testimony of the approvers from the case.

Welden v. *State,* 10 Tex. App. 401.

If that be done in this case, not a scintilla of evidence remains.

(See argument).

VI.

The court erred in declining to admit evidence to show that Joy had tried to influence the witness Ortseifen in the office of the Assistant District Attorney.

(See argument).

VII.

The court erred in sustaining the objection of the government to, and in declining to admit, evidence offered by the defendants to show a variance, to wit, evidence to prove that the approvers were known to the grand jury to have been conspirators and were not unknown.

A. In the courts of the United States, a variance arising from the fact that the evidence does not support an allegation that a thing is unknown to the grand jury, is a matter of affirmative defense which can be proved by the defense.

1. A variance resulting from failure of the proof to correspond with the allegations of the indictment is fatal.

U. S. v. *Riley,* 74 Fed. 210.
Naftzger v. *U. S.* (C. C. A.) 200 Fed. 494, 501.
State v. *Smith,* 89 N. J. L. 52, 97 Atl. 780.
People v. *Hunt,* 251 Ill. 446, 96 N. E. 220.

The variance may appear from the evidence offered by the prosecution.

Johnson v. *State*, 4 Ala. App. 62, 58 So. 754.

2. If it does not so appear, the averment is presumed to be true.

Coffin v. *U. S.*, 156 U. S. 432, 451.

3. The result of the presumption is to shift the burden of proof onto the defendant.

4 Wigmore on Evidence, § 2490.

Holt v. *U. S.*, 218 U. S. 245, 253.

B. The offer of proof was complete and satisfied all legal requirements.

1. The inquiry is as to the actual knowledge of the grand jury.

Com. v. *Glover*, 111 Mass. 394, 401.

Enson v. *State*, 58 Fla. 37, 40, 50 So. 948, 949.

2. The defendants offered to prove the actual knowledge of the grand jury by the witness who testified, and by a member of the grand jury who heard.

The grand juror was a competent witness.

Atwell v. *U. S.* (C. C. A.) 162 Fed. 97.

State v. *Benner*, 64 Me. 267.

Com. v. *Hill*, 11 Cush. 137.

Com. v. *Mead*, 12 Gray 167.

Com. v. *Green*, 126 Pa. St. 531, 17 Atl. 878.

12 R. C. L. 1039.

C. The variance was, therefore, fatal since the crime of conspiracy is not an exception to the general rule (See argument),

nor should it be.

State v. *Van Pelt*, 136 N. C. 633, 641.

Com. v. *Hunt*, 45 Mass. 111.

D. The cases cited in the opinion of the learned trial court, and the reasoning appearing therein, do not support its ruling.

(See argument).

VIII.

The court erred in giving the instruction which purported to describe to the jury the charge in the indictment, in that the offense so described was not the offense with which the defendants were charged.

The instruction was erroneous in that it omitted and misdescribed a necessary element of the crime, to-wit: beverage purposes.

The government was required to prove the beverage purpose.

State v. *White*, 31 Kan. 342, 2 Pac. 598.

The error was not corrected by any other instruction.

(See argument).

Point IV.

The evidence does not prove the commission of any one of the overt acts alleged in the indictment.

I.

The overt act is an element of the crime and, as such, at least one of the overt acts alleged in the indictment must be proved as alleged.

The overt act is a necessary element.

U. S. v. *Rabinowich*, 238 U. S. 78, 86.

Ryan v. *U. S.* (C. C. A.) 216 Fed. 13, 32.

Gruher v. *U. S.* (C. C. A.) 255 Fed. 474, 476.

It must be charged in the indictment.

Pettibone v. *U. S.*, 148 U. S. 197, 202.

Thomas v. *U. S.* (C. C. A.) 156 Fed. 897, 906.

Having been alleged, it must be proved.

U. S. v. *Hamilton*, Fed. Cas. 15288.

U. S. v. *Ault*, 263 Fed. 800, 803.

II.

The overt act must be an act to effect the object and cannot be the object itself.

The evidence does not show the commission of overt act No. 1, except possibly the collection of money from Ambrosi.

(See argument.)

The sale to Ambrosi was not an act to effect the purchase, transportation or possession for sale charged in the indictment.

(See argument.)

It, being a sale, could not "effect" the sale as charged in the indictment.

(See argument.)

Dealy v. *U. S.*, 152 U. S. 539, 546.

Lonabaugh v. *U. S.* (C. C. A.) 179 Fed. 476, 479.

U. S. v. *Dowling*, 278 Fed. 630, 639.

U. S. v. *Ault*, 263 Fed. 800, 804.

III.

The evidence does not prove the commission of overt act No. 5 as alleged.

(See argument.)

(Overt Acts Nos. 2, 3 and 4 are out of the case as the result of the discharge or acquittal of the doers of said acts.)

Point V.

The remarks of counsel for the government during argument constitute reversible error.

I.

The remarks were error.

A. Remarks dealing in personalities.

It was improper to declaim that the defendant Heitler was a King of the Underworld, a Shylock who bled his victims, a causer of so many tears that he could swim in them if they were gathered in one reservoir.

Hall v. *U. S.*, 150 U. S. 76.
Lowdon v. *U. S.* (C. C. A.) 149 Fed. 673
Ivey v. *State*, 113 Ga. 1062.

No charge that could have been given by the court would have removed the prejudice created by these remarks.

Union Pac. R. R. Co. v. *Field* (C. C. A.) 137 Fed. 14, 16.
Latham v. *U. S.* (C. C. A.) 226 Fed. 420, 425.

No evidence existed in the record to support any such remarks.

(See argument.)

B. Remarks purporting to deal with the evidence in the case.

It was improper to assert as a fact the Mandel Greenberg's alibi was "faked."

(See argument.)

It was improper to assert that Heitler procured the return of Joy's diamonds, as no evidence existed in the record from which any such deduction could logically, or even illogically, be drawn.

(See argument.)

II.

The remarks were not cured by instructions.

(See argument.)

Point VI.

There is no evidence in the record to prove the crime as charged, to-wit, a conspiracy to commit all four offenses charged as having been the object thereof.

I.

The government, having charged a conspiracy to commit four offenses, must prove that the conspiracy did, in fact, have as an object the commission of all four offenses.

A. The object of the conspiracy is an element of the crime and must be proved as alleged.

5 R. C. L. 1087.

12 C. J. 627.

B. If the indictment charge a conspiracy to commit four offenses, and the proof show a conspiracy to commit but one, two or three of said offenses, the proof has not sustained the allegations of the indictment.

1. To constitute a conspiracy there must be a common specific intent.

Frohwerk v. *U. S.*, 249 U. S. 204, 209.

(See argument.)

2. If the proof show a different intent, whether as to the means employed or the object, the indictment has failed of proof.

Rabens v. *U. S.* (C. C. A.) 146 Fed. 978.
Lawrence v. *State,* 103 Md. 17, 63 Atl. 96.
People v. *Brown,* 159 Ill. App. 396.
Lowell v. *People,* 229 Ill. 227, 82 N. E. 226.
Commonwealth v. *Harley,* 48 Mass. 506.
State v. *Hadley,* 54 N. H. 224.

3. If the proof show that the object of the conspiracy was merely a part of the object charged, the indictment has failed of proof.

Rex v. *Pollman,* 2 Campb. 229.
O'Connell v. *The Queen,* 11 Cl. & F. 155.

II.

There is no evidence in the record to prove that any conspiracy existed to commit all four offenses

(See argument),

nor is there any evidence, in fact, to prove that the defendants were parties to any conspiracy either to purchase, transport or possess

(See argument),

nor is there any evidence to prove that any transaction shown was for beverage purposes.

State v. *Lesh,* 27 N. D. 165, 145 N. W. 829.

ARGUMENT ON BEHALF OF PLAINTIFFS IN ERROR.

Point I.

The writs of error were not taken frivolously.

I.

The defendants contend that the National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes, notwithstanding the fact that the operation of Amendment XVIII, and the power of Congress derived therefrom, as to intrastate transactions, are limited to the prohibition of manufacture, sale and transportation for beverage purposes.

A. The amendment, and the power of Congress derived therefrom, are limited to the prohibition of intrastate transactions of manufacture, sale and transportation, and these only when done for beverage purposes.

We shall hereafter show that Amendment XVIII is limited in its operation to the prohibitions therein contained, and we shall further show that Congress must confine itself to the limits established by the amendment and cannot wander at will outside of those limits, cannot prohibit a gift, about which the amendment is silent, and cannot prohibit a sale for a non-beverage purpose. This will be shown in two ways, to wit:

1. By the effect of Amendment XVIII upon the hitherto plenary and exclusive police power of the states, and

2. By the effect of the amendment upon the hitherto enumerated and implied powers of Congress.

B. The Prohibition Act prohibits intrastate transactions not prohibited by the amendment and prohibits such transactions, and manufacture, sale and transportation, for purposes not prohibited by the amendment.

We frankly admit that, in interpreting the statute, it should be presumed that Congress intended to keep within its constitutional powers, but, since it is the statute, not the intent, which must be constitutional, we respectfully submit that the test of constitutionality is what may be done thereunder by those in authority (*State* v. *Williams,* 146 N. C. 618, 630, 61 S. E. 61, 65; *Colon* v. *Lisk,* 153 N. Y. 188, 194, 47 N. E. 302, 303), for the mere fact that power has touched lightly in the past is no indication that it will not annihilate in the future (*Brown* v. *Maryland,* 12 Wheat. 419, 439).

1. Section 3, which purports to be the enacting clause of the statute, is as follows:

> "No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor."

Giving effect to all of the words of Section 3, as we must (*U. S.* v. *Lexington Mill & Elevator Company,* 232 U. S. 399, 410), we find, among other things, that liquor (without specification of purpose) may not be manufactured, sold, bartered, transported, imported, exported, delivered, furnished or possessed, except as authorized in the Act. Liquor for non-beverage purposes may, however, be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as in the Act provided. These two provisions amount to the same thing. The Commissioner may issue permits, but only for such non-beverage sales, etc., as are permitted by the Act.

In *Kidd* v. *Pearson,* 128 U. S. 1, this Court had under consideration a prohibition law of Iowa (Code of Iowa, Ch. 6, Title 11, amended by Ch. 143, Acts of the General Assembly, 1884) of which Section 1523 provided that "no person shall manufacture * * * any intoxicating liquors, except as hereinafter provided; * * *." Section 1524 thereof continued "* * * and nothing contained in this law shall prevent any person from manufacturing in this State liquors for the purpose of being sold, according to the provisions of this chapter, to be used for mechanical, medicinal, culinary, or sacramental purposes." The decision of the Court was that Section 1523 was an unqualified prohibition on any and all manufacture, except as modified by the four specific exceptions of Section 1524. In *State* v. *Certain Intoxicating Liquors* (Utah) 172 Pac. 1050, the Court had before it a statute which forbade the manufacture, sale, etc., of intoxicating liquor within the state "except as hereinafter provided" and the decision of the Court was that it was the legislative intent to not only forbid the possession, but also to abolish property rights in alcoholic liquors within the confines of the state, aside from the exceptions expressly

provided for in the Act. This Court has stated in *Grogan* v. *Hiram Walker & Sons,* No. 615, decided May 15, 1922, that Section 3 "provides that, except as therein authorized, after the 18th Amendment goes into effect no person shall manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor."

By the plain and natural meaning of this provision, and in accordance with the interpretation given to similar provisions in the cases above cited, any sale or gift, for instance, to be rendered lawful must be authorized by an exception in the act. "Dispose of" and "furnish," being broader terms than gift, include it (*State* v. *Deusting,* 33 Minn. 102, 22 N. W. 442), and that such was the legislative intent is disclosed by a reference to Section 33, wherein it is provided that, under certain circumstances, possession shall be *prima facie* evidence of an intent to give away liquor in violation of the provisions in Title II.

2. Section 6 contains further limitations, in that it provides that "no one shall manufacture, sell, purchase, transport or prescribe any liquor without first obtaining a permit from the Commissioner so to do."

In *State* v. *Douglass,* 37 Tenn. 608, the Court had before it an indictment under a statute (Act of 1820, Ch. 13) which forbade the keeping of a billiard table "without first having obtained a license therefor." The Act of 1817, Ch. 179, had made it unlawful for any clerk to issue such a license. The circuit court quashed the indictment and the state appealed. In reversing the judgment and remanding the cause, the Supreme Court, speaking through Mr. Justice Wright, said, at page 609:

> "It is said the court below proceeded upon the ground, that inasmuch as the Act of 1820 forbids the keeping of a billiard table 'without first having obtained a license therefor'; and the act of 1817 pro-

hibits the license altogether, it must be implied that the Legislature meant to provide means to take out license, and having failed to provide the means of doing the act lawfully, which it did not intend absolutely to prohibit, the license cannot be required. This construction cannot be maintained. If the Legislature say that an act shall not be performed, except upon a condition precedent, which it is impossible to perform, the condition is valid and the prohibition absolute."

The effect of Section 6, then, is to prohibit the transactions therein named unless a permit be obtained, and if no provision can be found in the Act permitting the issuance of a permit for any given transaction for any given purpose, then such transaction for such purpose is forbidden by the Act.

3. Section 29, in so far as it is important in this case, is as follows:

"Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years."

The penalties imposed by this section are not on the sale, etc., of intoxicating liquor for beverage purposes, but are on the sale in violation of Title II or any provi-

sion thereof. One who makes a bona fide sale for a non-beverage use is subject to the same penalty as one who bootlegs for beverage purposes.

4. Analysis of Title II of the National Prohibition Act.

Title II, by Section 3, first prohibits certain transactions, except as later authorized in the Act, and then, by Section 6, prohibits certain of those transactions without a permit. It is elementary that an exception is strictly construed and no case is taken out of the operation of the statute unless the case comes clearly within the exception (Lewis' Sutherland Statutory Construction, 2nd Ed., Sec. 351-353). In this Act, however, Congress has made but few exceptions, clear or otherwise, to the operation of the blanket prohibitions of Sections 3 and 6.

The Act contains provisions relative to permits, but all such provisions are additional prohibitions, or regulations descriptive of permits which may be issued. For the sake of clarity, and in order to assist those who would controvert our interpretation of this Act, we may, perhaps, be permitted to ask the following: Under and by virtue of what specific section, provision or sentence of the National Prohibition Act is it permissible

(1) To give away or loan intoxicating liquor for any purpose;

(2) To purchase, manufacture or sell intoxicating liquor for culinary use;

(3) To give, deliver or furnish intoxicating liquor to one's wife to be by her used for culinary purposes;

(4) To sell or purchase intoxicating liquor to be kept in the home as a household remedy for medicinal purposes, the recipient not being ill at the moment of purchase or of obtaining the prescription;

(5) To manufacture, sell or purchase intoxicating liquor to be kept in hospitals for medicinal use, including pure alcohol for use in alcohol rubs, and, if a permit be necessary in any of the above instances, under and by virtue of what specific section, provision or sentence of the National Prohibition Act may it be demanded and obtained, from whom and how?

The reply can only be, that when Section 3 says that liquor for non-beverage purposes may be sold, etc.,

> "but only as herein provided,"

it does not mean that at all, but means that liquor for non-beverage purposes may be sold,

> "and the Commissioner may * * * issue permits therefor."

Yes, he may; but then again, he may not. Does this provision mean that the Commissioner has an absolute discretion as to whom, when and why he will issue a permit? If not, where in the Act is there any provision which states the circumstances under which a permit shall issue? The section is, in fact, an attempt to confer upon the Commissioner an absolute discretion (*Yick Wo* v. *Hopkins,* 118 U. S. 356), and he has so interpreted it (Regulations 60, Article II, Sec. 4). Such an attempted delegation of unlimited discretion is plainly void (*Yick Wo* v. *Hopkins, supra; Noel* v. *People,* 187 Ill. 587,58N. E. 616; *Village of Little Chute* v. *Van Camp,* 136 Wis. 526, 117 N. W. 1012; *Newbern* v. *McCann,* 105 Tenn. 159, 58 S. W. 114; *Devereaux* v. *Township Board of Genesee* (Mich.) 177 N. W. 967). Those who would uphold the constitutionality of this Act will find but little, if any, solace in this particular provision thereof.

II.

This Court has not yet passed upon the constitutional point raised herein.

Prior to the allowance of the writs of error and the transference of the record to this Court, and, indeed, up to the present writing, the question of the constitutionality of the sections of the Act involved in this case has not been presented to this Court for determination. The only cases which might possibly be claimed to have decided the principle involved are the *National Prohibition Cases,* 253 U. S. 350. These seven cases involved points in connection with Amendment XVIII which are not here in question, the only section of the Act considered by the Court in those cases being Section 1 of Title II. These cases have, however, caused considerable confusion, due to a failure to analyze the set of facts before the Court. A considerable number of the members of the bench and bar, having in mind the statement of Mr. Justice Clarke (dissenting) that the eleventh conclusion of the Court

> "approves as valid a definition of liquor as intoxicating which is expressly admitted not to be intoxicating in each of the cases in which it is considered,"

have taken it for granted that the decision of the Court was that Congress could prohibit the sale, etc., of a non-intoxicant in order to enforce the prohibition on the sale of intoxicants. Such being the case, we may be pardoned for quoting, at this point, the statement made by Lord Denman in *O'Connell* v. *The Queen,* 11 Cl. & F., at page 372:

> "Several Judges, and many barristers and persons in high situations, have expressed the same opinion in the same general terms, and they have taken for granted that it might be truly so stated. And I am tempted to take this opportunity of ob-

serving, that a large portion of that legal opinion which has passed current for law, falls within the description of 'law taken for granted.' If a statistical table of legal propositions should be drawn out, and the first column headed 'Law by Statute,' and the second 'Law by Decision;' a third column, under the heading of 'Law taken for granted,' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."

The error into which members of the legal profession have fallen can be traced to the failure to observe in those cases the violation of one of the fundamental rules of pleading, which has never been illustrated with better effect than in the case of *State* v. *Mitchell*, 47 W. Va. 789, 35 S. E. 845, where the Court's remarks were as follows (page 790 of the official report):

"Is sawdust a putrid, nauseous, or offensive substance? The indictment alleges that it is, and therefore it may be said that, on demurrer, it ought to be taken to be so; but if we can, by judicial notice, say that it is not so, the allegation that it is will not make it so. 'If a fact which the Court will take judicial notice of be erroneously pleaded, a demurrer does not admit such erroneous statement of fact, but the party filing the demurrer will be entitled to the advantage of the fact, as the Court will judicially notice it.' 11 Am. & Eng. Enc. Law (2d Ed.) 489, note 4. We know that sawdust is a clean substance, coming from the sawing of logs, not putrid, not nauseous, not offensive, even when it has become somewhat decayed, lying in large quantity. The indictment says it is otherwise, but our common knowledge of it denies this. * * *

If an indictment charge that one, without license, sold water or oil, charging it to be intoxicating, I take it that a Court would say it was not intoxicating, and would not go through a trial to hear evidence on the subject."

An examination of the records in the said cases discloses that the pleadings set forth that the complainants were concerned with the manufacture and sale of liquors which contained about 3% of alcohol by volume, "which liquors were not intoxicating." The statement that the liquor contained 3% of alcohol was a statement of fact, but the further statement of the pleader that, in his opinion, such liquor was not intoxicating, was a mere conclusion, which was not admitted by a motion to dismiss.

The Court cited as its sole authority, in support of the eleventh conclusion, the case of *Ruppert v. Caffey*, 251 U. S. 264. We cannot bring ourselves to believe that, by this citation, the Court meant it to be understood that a limited power of enforcement is as extensive as the original and plenary war power. Rather, we prefer to believe that the Court merely meant that since, as appears in the *Caffey* case, eighteen states had by statute defined "intoxicating liquor" to be liquor containing ½ of 1%, or more, of alcohol by volume, and sixteen more had made the test a list of enumerated beverages without regard to alcoholic content, or the presence of any alcohol in a beverage regardless of quantity, the conclusion follows irresistably that when the people and the states prohibited the sale, etc., of "intoxicating liquor," and granted to Congress a power of enforcement, they thereby also granted to Congress permission to use the very same definition of intoxicating liquor which they, the people and the states, had themselves theretofore established. In other words, the decision of this Court was merely that liquor containing ½ of 1% or more of alco-

hol by volume was to be considered "intoxicating liquor" within the meaning of Amendment XVIII.

It has been settled, beyond argument, by the decisions of this Court, that "an unconstitutional law is void and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void and cannot be legal cause for imprisonment" (*Ex parte Siebold*, 100 U. S. 371; *Little Rock & Ft. Smith Ry.* v. *Worthen*, 120 U. S. 97). On the assumption that Sections 3, 6, and 29 are unconstitutional, the defendants could not be convicted of the substantive offenses therein defined, and surely it cannot be maintained that they can be convicted, under Section 37, of an agreement or conspiracy to commit such substantive acts.

Point II.

The National Prohibition Act is unconstitutional in that it prohibits intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and in that it prohibits intrastate transactions in intoxicating liquor, including manufacture, sale and transportation, for purposes other than beverage purposes.

We shall first prove our point by showing the effect of the amendment upon the police power of the states; then we shall verify the proof by showing the effect of the amendment upon the powers theretofore possessed by Congress.

I.

Before the adoption of Amendment XVIII all police power over intrastate transactions in intoxicating liquor was vested solely in the several states.

A. The police power generally is possessed by the states.

In matters of police regulation there can be no such thing as a divided sovereignty. The jurisdiction must either be vested in the states or in the federal government; it cannot be divided between the two (*Re Heff*, 197 U. S. 488, 506). It is not our object to indulge in a lengthy discussion of the police power, nor to trace its origin back through the Confederation to the original thirteen independent sovereignties. Suffice to say that it has been settled beyond argument that the United States lacks the police power, which was expressly reserved to the several states by Amendment X (*Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 156) and that the regulation of intrastate transactions in intoxi-

cating liquors, one of the most common exercises of the police power, has heretofore been exclusively within the domain of state jurisdiction (*Re Heff*, 197 U. S. 488, 505). The original disposition of the power of legislation over the subject of intoxicating liquors conforms to the general scheme of the division of powers between the national and the state governments.

We therefore start with the proposition that formerly the whole of the police power with respect to intrastate transactions in intoxicating liquors was vested in the several states, the United States possessing no share in that power.

B. The police power is not only the power to enact legislation, but is also the power to refrain from enacting legislation.

The police power has generally been defined as the power to enact regulations of a particular kind. Cases which contain such definitions are almost invariably cases in which one party seeks to avoid a statute by asserting that the enactment thereof was not a proper exercise of the police power. In *Richards* v. *Palace Laundry Co.*, 55 Utah, 409, 186 Pac. 439, however, the Court had under consideration an instance, the establishing of traffic regulations, where the legislature had failed to act, and in *Hammer* v. *Dagenhart*, 247 U. S. 251, it was said, at page 273, that

> "there is no power vested in Congress to require the states to exercise their police power * * *."

Silence or the failure to prohibit or regulate is an expression of will that the subject matter be left free from any restriction or regulation (*Robbins* v. *Taxing District*, 120 U. S. 489, 493), but since no one has had the ignorance to suggest that a legislature could be compelled to exercise its police power by affirmative action, courts have not been called upon to define this power in

its other aspect, that of non-action. From its nature, the police power must be not only the power to enact legislation, to regulate or prohibit, but also the power to refrain from enacting legislation, the power to permit complete freedom of action. The keeping of hogs within the limits of a village may be prohibited by the common council in the exercise of the police power. How can it be said that the failure of the common council to prohibit such keeping of hogs is not an exercise of the police power, a decision that such keeping of hogs is not yet dangerous to the health of the community? The decisions holding invalid statutes and ordinances proceed on this theory—the subject-matter forbidden may be within the police power, but public welfare has not yet required its extension to meet that particular condition (12 C. J. 909). In such a case, non-action, and not action, is the proper exercise of the power.

II.

Amendment XVIII prohibits merely the manufacture, sale, transportation, importation and exportation of intoxicating liquor for beverage purposes and does not prohibit, nor grant the power to Congress to prohibit, any transactions in intoxicating liquor except the foregoing five, and does not prohibit, nor grant the power to Congress to prohibit, those five transactions when done for any purpose other than beverage purpose.

A. Section 1 of Amendment XVIII should be restricted to the natural meaning of the words used therein.

It is respectfully submitted that the words of this section need no construction and but little interpretation. The section says plainly and distinctly that:

"After one year from the ratification of this arti-

cle, the manufacture, sale, or transportation of intoxicating liquor within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

The rule of interpretation whereby the intent of the amendment is to be discovered has been admirably stated by Mr. Justice Lamar in *Lake County* v. *Rollins,* 130 U. S. 662, where the learned Justice said, at page 670:

> "Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain; and in such case, there is a well-settled rule which we must observe. * * * If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

A constitutional amendment, before its adoption, must meet with the approval of three-fourths of the states of the Union and it may be assumed that the Congress which framed this amendment had in mind the difficulty of obtaining its ratification. It may be further assumed that, having a complete discretion as to the prohibitions which it would propose to the states for adoption, Congress chose those prohibitions which, after careful thought, it believed would meet with the approval of the greatest possible number. The states, in ratifying the proposed amendment, had before them a plain and unequivocal statement that five certain transactions in intoxicating liquor, when done for beverage purposes, were prohibited. In that statement there was contained no intimation of further prohibitions hidden in ambiguous phrases.

It is not our purpose to discuss the moral right of a government to regulate the conduct of its citizens in certain respects, as that subject has been most ably treated by Mr. Justice Barker in *Commonwealth* v. *Campbell*, 133 Ky. 50, 117 S. W. 383. We may, however, venture a doubt as to the right of the United States to prohibit the use of wine and cordials in sauces, the use of pure and unadulterated alcohol for polishing ivory piano keys and for alcohol rubs, the use of brandy in mince pies, etc. (*Sarrls* v. *Commonwealth*, 83 Ky. 327, 331). The question we are now discussing is, whether or not such uses of intoxicating liquor actually have been forbidden. We submit, however, that the amendment is not the result of a crusade against mince pies, alcohol rubs or piano keys.

Amendment XVIII is the first attempt to limit by a constitutional provision the use and enjoyment of previously acquired property. Amendment XIII merely had the effect of annunciating, in a constitutional provision, an accomplished fact which had already resulted from the Emancipation Proclamation and from a successful termination of the Civil War (*Slaughter-House Cases*, 16 Wall. 36, 68; *Texas* v. *White*, 7 Wall. 700, 728).

Amendment XVIII also infringes, for the first time, upon the hitherto plenary and exclusive police power of the several states. No previous amendment or constitutional provision was intended or could be construed so to do (*Barbier* v. *Connolly*, 113 U. S. 27, 31). Every intendment must be against divesting the sovereignty of a state of any right, privilege, title or interest, even when such divesting is the act of the state itself (*U. S.* v. *Herron*, 20 Wall. 251, 263), and how much more strict should be the rule and its application when the divesting is not the act of the state itself, but is the act of other states, as is the fact with respect to the non-ratifying states.

B. Section 1, according to its natural meaning, prohibits merely the said five transactions in intoxicating liquor when done for a specific, *i. e.*, beverage purpose.

In considering Amendment XVIII, it should first be noted that Section 1 does not contain a grant of power to Congress to do anything. The prohibitions therein contained are self-executing (*National Prohibition Cases,* 253 U. S. 350). This determination of the operation of Section 1 conforms to the former decisions of this Court on previous amendments having the same general form (*Civil Rights Cases,* 109 U. S. 3; *Hodges* v. *U. S.,* 203 U. S. 1; *Guinn* v. *U. S.,* 238 U. S. 347), particularly with those decisions interpreting Amendment XIII, which provides that

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction."

We have already seen that the Act prohibits practically every conceivable transaction in intoxicating liquor for any and every purpose, and its validity in prohibiting such transactions must depend primarily upon whether or not such other transactions may be comprehended within the word "sale," as we apprehend that not even the most ardent prohibitionist will contend that a prohibition on a purchase, gift, loan or exchange can be derived from a prohibition on manufacture, transportation, importation or exportation.

A number of cases have arisen which have considered various aspects of the question of whether or not a prohibition on a gift might be derived from a prohibition on a sale, the decisions being in the negative. A case exactly in point is that of *Holley* v. *State,* 14 Tex. Cr. App. 505, wherein the first question before the Court

was the operation of Section 20 of Article 16 of the state constitution, which provided that

> "The Legislature shall, at its first session, enact a law whereby the qualified voters of any county, justices precinct, town or city, by a majority vote, from time to time may determine whether the sale of intoxicating liquor may be prohibited within the prescribed limits."

The Court, speaking through Mr. Presiding Judge White, first held that the above constitutional provision was a limitation upon the power of the legislature to enact legislation, that is, the power was thereafter to be confined within the limits of Section 20. Pursuant to its supposed powers under the constitution, the legislature passed enforcement statutes which prohibited not only the sale but also the exchange and gift of intoxicating liquors. The second question before the Court was, to quote from the opinion (page 509),

> "Are our civil and criminal local option statutes * * * constitutional in so far as they attempt to prohibit the *giving away** of intoxicating liquors within the prescribed bounds where local option has been adopted?"

In deciding that the said statutes were unconstitutional, because the prohibition on gift was beyond the powers of a legislature having only the power to prohibit a sale, the Court said, at page 513:

> "Did the framers of that instrument intend that *a gift** should also be prohibited? It is scarcely possible, or even probable, that they could have done so; for it is but just and reasonable to presume that, had such been the case, they would, when they had the matter in hand, have expressed that intent in language equally as plain and unambiguous in the instrument itself. Construing the instrument by its own terms, it must be clear that its makers never

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*Italics the Court's.

intended to prohibit the giving away of intoxicating liquors, or they would have said so in the provision itself when they had the subject under consideration."

The dictionaries, to which we are permitted to refer (*Hodges* v. *U. S.*, 203 U. S. 1, 17), make clear the distinction between these two transactions and many other cases, which have been cited in the brief, also bear on the subject, but we do not deem it necessary to comment upon them.

Property in intoxicating liquors may also be transferred, completely or to a limited extent, by transactions other than sale or gift, such as exchange and loan. Such a case was *Gillan* v. *State*, 47 Ark. 555, where the defendant had been convicted of selling liquor to a minor. The facts were that the minor had given money to a negro who purchased liquor for him, but without disclosing his agency. The liquor was not to the minor's taste and he returned it in person, receiving from the defendant, in lieu thereof, a different brand. The Court reversed the judgment of conviction on the grounds that the statute forbade only the act of selling, saying, at page 557:

> "In *Ward* v. *State*, 45 Ark. 351, we were forced to hold that one who gave liquor to a minor could not be convicted of selling him the liquor under this statute. Quoting, with approval *Seigle* v. *People*, 106 Ill. 89, the court there say: 'We cannot construe the word "sell" in such a statute to mean something different from its ordinary legal import.' An exchange or barter has a different legal import from a sale, as was pointed out by this court in *I. Z. Cooper's case*, 37 Ark. 412, determined under the statute making it penal to sell, barter or otherwise dispose of, mortgaged property."

Other cases, cited in the brief, make clear the distinctions between these transactions.

The distinction between purchase and sale is so well established and so obvious that we do not deem it necessary to devote space to comments thereon.

The cases cited in the brief disclose the fact that many states have annunciated and maintained well defined distinctions between a sale and other legal transactions whereby property is transferred. This situation is exactly the reverse of that which existed in the *National Prohibition Cases.* In those cases, as we have heretofore pointed out, an examination of authority warranted the conclusion that when the states and the people ratified Amendment XVIII they were satisfied to have included within "intoxicating liquor" any liquor within the definition theretofore established by them. An examination of authority discloses the fact, however, that there is not only no authority for imagining that the states and people meant to prohibit purchase, gift, loan and exchange, but, on the contrary, it affirmatively appears that these transactions were not meant to be, nor considered to be, included within the prohibition on sale.

By the provisions of Section 1, all manufacture, sales and acts of transportation are not prohibited, but only such as are for "beverage purposes." The meaning of these words is not hidden beneath a mass of verbiage and speculation as to their meaning is not warranted. Sales for beverage purposes, in the language of Mr. Justice Holmes (then a Justice of the Supreme Court of Massachusetts) in *Commonwealth* v. *Mandeville,* 142 Mass. 469, 8 N. E. 327, are "sales of liquor to be drunk for the pleasure of drinking."

With respect to this prohibition on sales, etc., for a specified purpose, Amendment XVIII is comparable to Amendment XV, which provides that the right to vote shall not be denied on account of race, color or previous condition of servitude. This provision of Amendment

XV is self-executing (*Guinn* v. *U. S.*, 238 U. S. 347, 363), but the prohibition on the denial of the right to vote is not operative except where such denial was on account of race, color or previous condition of servitude. So Amendment XV is not applicable to a denial of the right to vote on account of sex (*U. S.* v. *Anthony*, Federal Case 14459).

State v. *Langdon*, 29 Minn. 393, 13 N. W. 187, is directly in point. That case involved the authority of the common council of a village to issue a license for the sale of liquors for non-beverage purposes. The act of the legislature incorporating the Village of Worthington (Chap. 5, Spec. Laws, 1873, Minn.) provided, in Section 14, that no license for the sale of malt, spirituous or intoxicating liquors *as a beverage* should be granted to any person within such village. Section 16 of the same act gave authority to the common council of the village to restrain any person from vending any liquors "unless duly licensed by the common council." The Court limited the prohibition of the statute to beverage purposes, saying at page 396 of the official report:

> "The law, then, absolutely prohibits the granting of a license for the sale of malt, spirituous, or intoxicating liquors, as a beverage, within this village, and prohibits any sale for such purposes. For other purposes the county commissioner may grant licenses, and so may the village council."

An analogous situation was considered by this Court in *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, wherein there was presented for consideration the Webb-Kenyon Act (Act of March 1, 1913, 37 Stat. at L. 699). This statute, omitting immaterial words, reads as follows:

> "The shipment or transportation * * * of * * * intoxicating liquor * * * from one State * * * into any other State * * * which * * * intoxicating liquor is intended, by any person inter-

ested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State * * * is hereby prohibited."

This Court, speaking through Mr. Justice Day, in commenting upon the statute, said, at page 199:

"It would be difficult to frame language more plainly indicating the purpose of Congress not to prohibit all interstate shipment or transportation of liquor into so-called dry territory, and to render the prohibition of the statute operative only where the liquor is to be dealt with in violation of the local law of the State into which it is thus shipped or transported. * * * Thus far and no farther has Congress seen fit to extend the prohibitions of the Act in relation to interstate shipments."

Finally, therefore, if we may be permitted to adapt to the instant case the language of Mr. Justice Lamar, in *Kidd* v. *Pearson*, 128 U. S. 1, at page 19:

The effect of the amendment, then, is simply and clearly to prohibit all manufacture, sale, transportation, importation and exportation of intoxicating liquors for the one purpose specified. "For the purpose," says the amendment. The specified purpose is all that makes such transactions unlawful.

The effect of Amendment XVIII, then, is to prevent the states from permitting within their respective borders, in the exercise of their police power in the true sense, the manufacture, sale and transportation of intoxicating liquors for beverage purposes. They may still permit, if they see fit, such transactions for other purposes, or other transactions for any purpose. Nothing in the amendment contained gives any warrant for further limiting the police power of the states. The words of the late Chief Justice in *Guinn* v. *U. S.*, 238 U. S. 347, 362, although spoken of Amendment XV, are equally applicable to Amendment XVIII:

"(*a*) Beyond doubt the amendment does not take

away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support and both the authority of the nation and the State would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the State, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.

(*b*) * * * Thus the authority over suffrage which the States possess and the limitations which the Amendment imposes are cöordinate and one may not destroy the other without bringing about the destruction of both."

The power of the states to permit the sale of intoxicating liquor for other than beverage purposes, either unrestricted or under regulation, being cöordinate with the prohibition on sale for beverage purposes contained in Amendment XVIII, is it not perfectly obvious that the United States, in enforcing such prohibition, cannot forbid or punish a transaction which the states may permit under and by virtue of their equal power? The residuum of the police power (r) now remaining in the several states is, therefore, the former unqualified power (f) as affected by the prohibitions of Amendment XVIII (p), or phrased algebraically,

$$r=f-p.$$

We admit quite freely that ascertaining the effect of a constitutional amendment by what may be called the subtraction method is more or less novel, but we respectfully submit that it is the proper method to employ in ascertaining what remains of a whole (the police power) after certain parts (the prohibitions) have been taken away.

C. Section 2 grants a mere power of enforcement to Congress which cannot be used to extend the terms of Section 1; any such attempted extension is unconstitutional and void.

We have sought to determine the extent of the power granted to Congress by approaching the question from the standpoint of the effect of the amendment upon the police power of the states. The proposition, having been established as above, may be proved by the more conventional method of approach, that is, by determining the effect of Amendment XVIII upon the hitherto enumerated and implied powers of Congress.

Notwithstanding the adoption of the amendment, the United States remains a government of enumerated powers and any congressional legislation directed against individual or state action which was not warranted before the amendment must find authority in it (*Hodges v. U. S.*, 203 U. S. 1, 16). Whatever power is granted by the amendment is granted by Section 2, not by Section 1. This power is not a broad, general power necessitating investigation and the use of discretion, as is the case with other powers, such as the power to regulate interstate commerce or the power to raise and support armies. Congress has no discretion as to whether the sale, for instance, of intoxicating liquor, shall be prohibited for beverage purposes, nor has it any discretion as to the extent of the prohibition. Section 1, in and of its own inherent force, has prohibited, absolutely and under any and all circumstances, the sale of intoxicating liquor for beverage purposes. Section 2 merely grants to Congress a concurrent power to enact legislation which is appropriate to the enforcement of certain existing enumerated prohibitions. "This is the legislative power conferred upon Congress, and this is the whole of it" (*Civil Rights Cases*, 109 U. S. 3, 11).

This brings us directly to the determination of the meaning of the words "appropriate legislation." We respectfully submit that appropriate legislation must, in the first place, be such as forbids the acts which are prohibited by the amendment, and, in the second place, must be limited in its scope to the acts so prohibited, that is, must not prohibit other acts which are not prohibited by the amendment. The usurpation of a plenary and original sovereign power under the mask and guise of a carefully limited power of enforcement is not to be tolerated.

In the *Slaughter-House Cases*, 16 Wall. 36, an attempt was made to bestow upon the United States a discretionary power under the guise of a power of enforcement. The Court, speaking through Mr. Justice Miller, said at page 77:

> "Was it the purpose of the fourteenth amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States*,* to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?
>
> All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any of them are supposed to be abridged by State legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the States, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And still further, such a construction would constitute this court a perpetual censor upon all legisla-

*Italics the Court's.

tion of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights, as they existed at the time of the adoption of this amendment."

In *U. S.* v. *Cruikshank*, 2 Otto 542, at page 555, the following language was used by Mr. Chief Justice Waite in speaking of the self-executing prohibitions of Amendment XIV:

> "The only obligation resting upon the United States is to see that the States do not deny the right (to an equal protection of the laws). This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

Under the enforcement provision of Amendment XIV, Congress attempted to launch itself upon a career of unrestricted legislation in what was then, as is now the case under Amendment XVIII, regarded as a highly moral field. The Court met this situation in the *Civil Rights Cases*, 109 U. S. 3. It was there decided that that amendment did not invest Congress with power to legislate upon subjects which the self-executing prohibitions of the amendment left untouched. If Congress, under that amendment, could not create a code of municipal law for the regulation of private rights, how can it be said that, under this amendment, it can create a code of municipal law for the regulation of the traffic and use of intoxicating liquor? It is true that Amendment XVIII, unlike Amendment XIV, also operates upon the individual citizen and in this respect resembles Amendment XIII, but it is also true that, as to its effect upon the states, Amendment XVIII has exactly the same effect as if it were phrased:

Section 1. No state shall permit, within its boundaries, the manufacture, sale or transportation of intoxicating liquor for beverage purposes.

Section 2. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The cases arising under Amendment XIII are directly in point. Section 1 of that amendment operates not only upon the individual but also upon the states, in that the states may no longer, in the exercise of their power to further the welfare of their citizens, permit and legalize slavery or involuntary servitude within their respective boundaries, except by way of punishment for crime.

In the *Civil Rights Cases,* 109 U. S. 3, an attempt was made to support the constitutionality of a statute providing for the equal rights of persons of color in hotels by asserting that Congress, under its power to enforce the prohibitions of Amendment XIII, had power to enact the statute in question. The Court said, however, speaking through Mr. Justice Bradley (page 20):

> "It is true, that slavery cannot exist without law, any more than property in lands and goods can exist without law: and, therefore, the Thirteenth Amendment may be regarded as nullifying all State laws which establish or uphold slavery. But it has a reflex character also, establishing and decreeing universal civil and political freedom throughout the United States; and it is assumed, that the power vested in Congress to enforce the article by appropriate legislation, clothes Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States. * * * Conceding the major proposition to be true, that Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents, is the minor proposition also true, that the denial to any person of admission to the accommodations and privileges of an inn, a public conveyance, or a theater, does subject that person to any form of servitude, or tend to fasten upon him any badge of slavery? If it does not, then power to pass the law is not found in the Thirteenth Amendment."

The Court thereupon decided that the enforcement power of Congress could not be extended to embrace the subject-matter of the statute.

We come now to a consideration of the proposition assumed for the purpose of argument in the above excerpt, namely, that the power vested in Congress to enforce the prohibitions of Section 1 by appropriate legislation, clothes Congress with power to enact all legislation "necessary and proper" to prohibit intrastate transactions in intoxicating liquor other than manufacture, sale and transportation, and to prohibit any transaction irrespective of purpose, whether beverage or nonbeverage. It is submitted that no decision or even dictum of this Court, including the above excerpt, can be found which gives countenance to any such legal theory.

The proposition now to be considered is an attempt to apply the doctrine of implied powers annunciated by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, at page 421, to wit:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

This doctrine has its origin in the last sentence of Section VIII of Article I of the Constitution, to wit:

> "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

Examining that sentence, we notice that the power must be one to carry into execution another power. In other words, it must be an *ancillary* power. It is not permissible to imply powers right and left, to create original

powers out of whole cloth. Before a resort can be had to the above quoted part of Section VIII, the original or major power must exist. Then and then only, may the ancillary power be implied and brought into operation.

Applying these principles to the instant case, what is the original and existing power conferred upon Congress by Amendment XVIII? The power to enact appropriate legislation, that and nothing more.

The cases which apply the doctrine of ancillary powers, as we prefer to call it, are all cases wherein a broad, general power was involved, such as the powers enumerated in the major part of said Section VIII—the power to regulate interstate commerce, to raise and support armies, etc. In the exercise of these powers, discretion is involved. Congress may, in the first instance, decide either to do or not to do a certain thing, as, to regulate interstate commerce. Having decided to regulate commerce, it may proceed to act within certain limits. Those limits are the limits of the original power and the ancillary power, by whatsoever name it be called, may not be brought into operation to extend those limits.

In *Keller* v. *U. S.*, 213 U. S. 138, this Court had under consideration a statute which provided that

> "Whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty," etc.

This statute was held unconstitutional, the Court, speaking through Mr. Justice Brewer, saying at page 148:

> "That there is a morai consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Con-

gress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the States, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. *Fairbank* v. *United States,* 181 U. S. 283. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas* v. *White,* 7 Wall. 700, 725, that 'the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states'."

In *Hammer* v. *Dagenhart,* 247 U. S. 251, this Court had before it a statute which prohibited the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under fourteen were permitted to work. The act also contained other provisions as to children between fourteen and sixteen. This statute, also, was declared unconstitutional, the Court, speaking through Mr. Justice Day, saying, at page 273:

"The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the States in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

The persistence of Congress in legislating for the benefit of citizens in a purely local matter resulted in an attempt to pass another child labor law under the guise of a tax law. This was also held unconstitutional in *Bailey* v. *Drexel Furniture Co.*, No. 657, decided May 15, 1922. The remarks of the Chief Justice therein are very pertinent to the instant case:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for near a century and a half."

Such, indeed, is the case with the Prohibition Act. The argument that this legislation is unconstitutional, because in breach of state and private rights, provokes from many good citizens the same casual shrug of detached interest that the bootlegger gives when informed that his trade is in violation of the Constitution.

We have seen that limitations exist where there is involved a complete power which embraces the entire field, and surely they cannot be ignored when the power embraces merely a small, fractional part of the field.

The theory of ancillary powers is not applicable to a power to enforce self-executing prohibitions, nor is it adapted to any such application, but this Court will undoubtedly be requested in this case to take up this theory and by means thereof extend the amendment to cover the entire conceivable field, and the excuse which will be given to persuade the Court to take this step will be that Amendment XVIII is the law and "the law must be enforced." It is under such sophistry as this, without con

sidering the nature of the law, or the proper limitations which must ever exist in the exercise of power, that the most cruel and despotic acts of persecution have been defended.

We do not mean to contend that Congress must be confined to the exact wording of the amendment, but we may be permitted to suggest that the proper method by which to meet the enforcement situation is not by wrenching the Constitution, nor by seeking to extend and apply a doctrine which was never intended so to be applied and which in and of its very nature is not applicable. Congress, we submit, should apply to violators of Section 1 of the amendment the identical principle which should be applied to the exercise by Congress of its powers under Section 2, namely, that which cannot be done directly, cannot be done indirectly or by way of subterfuge. Let Congress enact a statute which first prohibits and penalizes a sale, for instance, for beverage purposes; which then prohibits and penalizes a sale under the guise of a gift, loan, exchange or other transfer; which then prohibits and penalizes a sale for beverage purposes under the guise of a sale for non-beverage purposes. Such a statute would sufficiently and adequately enforce the prohibition on sale for beverage purposes without infringing either upon the power of the states to permit, with or without regulations, the sale for non-beverage purposes, or the right of the individual, derived from the permission of a state, to sell for non-beverage purposes. Such a statute as that outlined above will not, we fully appreciate, content those in whom reformatory tendencies have run riot, nor yet those who are satisfied with nothing less than dictatorial powers over the likes and dislikes of their fellow men. The amendment, however, must be enforced within the limits ordained by the many, not within the boundless expanse wished for by the few.

At this point, we inevitably meet the argument that intoxicating liquor is a commodity of such annihilating force that the situation, from a "practical standpoint," demands that some must be sacrified in order to save many. In the first place, that proposition is contrary to fact—it is the rights of the temperate many which it is sought to subordinate to the saving of the inconsequential drunken few. In the second place, assuming the proposition to be true, the argument as to the necessity of sacrificing the rights of the individual to the mass is rapidly approaching the point of being run into the ground. The establishing of mass equality, the establishing of political equality between ruler and ruled, has not been the end and aim of the long struggle for liberty. An analysis of history and of the provisions of our own Constitution negative any such idea. The essential element in liberty, without which liberty is a mere empty sound, is the privilege of nonconformity in those matters which affect only the private life of the individual. Conformity is the antithesis of individuality, and this nation was founded by individualists, not by conformists. It is an historical fact that the more primitive and backward a race is, the more nearly its members conform to a single type, having the same religion, the same thoughts, eating the same food, doing the same things in the same ways. Progress comes only when individuals are permitted to have different thoughts, to do different things, to do any given thing in different ways—in short, to possess individuality. Racial and sectional antipathies are founded mainly upon dislikes caused by primitive-minded inability to tolerate differences in habits, customs or appearances. Although the selling argument of all professional hawkers of reform is that the world will be made a better, cleaner, sweeter place to live in by the abolition of whatever it is they are trying to abolish,

we nevertheless maintain that seeking to impose upon others one's own ideas in matters which do not affect society injuriously is not an indication of advanced thought, but is the hallmark of a brain which is fairly primordial in its intellectual limitations.

The people of the United States, as they have heretofore existed and as they exist today, have certain differences in dress, dialect, habits and customs.

> "No political dreamer was ever wild enough to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." (Mr. Chief Justice Marshall, in *McCulloch* v. *Maryland,* 4 Wheat., at 403.)

These words, though spoken in another connection, have an application here. When differences in habits and customs exist, the privilege of enjoying, of possessing, of retaining such differences, in other words, the privilege of nonconformity, whether in the individual or the community, makes for contentment and minimizes the possibility of friction. Well has John Stuart Mill said in his essay "On Liberty,"

> "No society in which these liberties are not, on the whole, respected, is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily or mental or spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest."

When, however, the individual or the community is ordered under penalty to refrain from a harmless course of conduct in order to conform to the ideas of some other individual or community, then government becomes op-

pressive and a feeling of resentment is aroused—then may citizens well say,

> "the iron yoke of outward conformity hath left a slavish print upon our necks."

That is exactly the situation which exists today with respect to the enforcement of prohibition, which, it is a fact of common knowledge, has aroused feelings that range from anger to disgust. For the first time in the history of this nation a provision of our Constitution has failed to retain the support of the public. The Prohibition Act serves as the butt of jokes and witticisms; it has been denounced by churchmen from the pulpit; it is treated with cynical disregard by substantial citizens of standing. Why? In the first place (it is our belief), the people, who permitted their legislatures to ratify Amendment XVIII, believed it to be aimed solely at the saloon, an institution pecular to American life which no one cares to defend. They now find that it is impossible to acquire intoxicating liquor to be used in the home for beverage purposes. Whether or not this belief be true, no one can say. We have only the words of the amendment before us and they are perfectly plain.

In the second place, however, and in this we are supported by authority, they did not intend to prohibit or restrict non-beverage uses. Never did it enter their heads that, under the operation of an enforcement law, the invalid would be deprived of the cooling effect of a pure alcohol rub; that the household would be deprived of its mince pies, its brandied fruits, its sauces; that the individual would be forbidden to purchase whiskey to keep in his home as a household remedy, but would be forced to wait until he was actually sick, then to search for a doctor who had taken out a permit to prescribe intoxicating liquor, then to search for a druggist who had taken out a license to sell. All these things and more result

from the statute now under consideration. The housewife and the invalid, the substantial and otherwise law-abiding citizen, persons of moderate means who were unable to purchase and store away stocks of liquor, are driven by this law straight into the awaiting arms of the bootlegger with his deleterious concoctions. No one may sell intoxicating liquor for the abovementioned non-beverage purposes—except the bootlegger. No one may buy—except by becoming a party to the bootlegging trade. Can it be a cause for wonder that this enforcement program lacks the moral support of citizens from whom such support should naturally come?

We realize that, by a process of *post hoc* reasoning, every evil to which the human race has ever been subjected has been blamed upon intoxicating liquor. Much of this abuse has been proved to be unfounded, and in this connection we beg leave to refer the Court to an illuminating article in the February, 1921, number of "The North American Review" by a distinguished alienist, Dr. Pearce Bailey, upon which we will not pause to comment.

We further realize that, in defending the use of intoxicating liquor, even for non-beverage purposes, we are on dangerous ground. It is not fashionable to do so, and we have been admonished by Mill that

> "The man * * * who can be accused either of doing 'what nobody does,' or of not doing 'what everybody does,' is the subject of as much depreciatory remark as if he * * * had committed some grave moral delinquency."

The defense, however, is made and it is placed squarely upon the truth that the prosperity and greatness of the nation and the welfare and contentment of its citizens depend upon a division of authority between nation and state, upon a sharp demarcation of that line over which neither nation nor state may trespass.

Recurring to the subject of "appropriate legislation," however, let us, as did the Court in the *Civil Rights Cases,* assume, for the purpose of argument, that "the major proposition" is true; that Congress has acquired, by some process, known or unknown, the power to pass all laws and to do all things necessary, proper or convenient to carry into effect the prohibitions of Section 1, and that Congress may do so whether or not its action infringes upon the police power of the states or upon the rights of the individual derived from the states. That being assumed, the Act is, nevertheless, unconstitutional unless the use of intoxicating liquor for the non-beverage purposes therein prohibited has a real and substantial tendency to result in a use for beverage purposes.

In *City of Jacksonville* v. *Chicago & Alton R. Co.,* 274 Ill. 152, 113 N. E. 91, the Court had under consideration an ordinance reading as follows:

> "It shall be unlawful for any express company, railway company or other common carrier, or for any person, to bring into or to deliver to any person within the city of Jacksonville any intoxicating liquor."

City councils were authorized by paragraph 46 of Section 1 of Article 5 of the Cities and Villages Act (Hurd's Rev. St. 1915-16, c. 24, sec. 62) to license, regulate and prohibit the selling or giving away of any intoxicating, vinous, malt, spiritous or fermented liquor; by paragraph 59 to prevent intoxication; by paragraph 66, to regulate the police of the city and to pass and enforce all necessary police ordinances; and, by paragraph 98, to pass all ordinances and make all regulations proper or necessary to carry into effect the powers granted cities or villages.

The defendant was clearly guilty of violating the ordinance, but pleaded that it was void, and the trial court

so held. In affirming the judgment, the Court, speaking through Mr. Justice Dunn, said at page 335 of the official report:

> "The authority which the legislature has conferred upon cities is to prohibit the sale of intoxicating liquors and to prevent intoxication. While this grant carries with it the power to adopt ordinances reasonably necessary for the purpose it does not confer power to destroy property rights. It is true that if there are no intoxicating liquors in the city there will be no intoxication. The same paragraph which authorizes cities to prevent intoxication authorizes them to prevent dog-fights. If there are no dogs there will be no dog-fights, but probably it would not be claimed that the power to prevent dog-fights authorized the prohibition of the keeping of a dog within the city or bringing one in."

It would seem plain that the mixing of liquor with mince meat or the rubbing of pure alcohol upon the body not only has no tendency to result in a beverage use, but, in fact, makes such a use absolutely and physically impossible. The whole thing comes merely to this—some individuals may purchase intoxicating liquor for a non-beverage use and, instead of so using it, may drink it; therefore, to make the crime less easy to commit, the entire temperate and law-abiding population of the country must be unduly restricted in its rights and privileges. We respectfully submit that this is carrying to an unbearable extreme the proposition of "no dog, no dog-fight."

III.

The National Prohibition Act, being unconstitutional, cannot be saved by striking out objectionable parts or by inserting limitations.

We submit that the Act, as it now stands, is unconstitutional. It remains to be seen whether the Court can

save it by striking therefrom objectionable prohibitions, such as the prohibition on purchase or gift, and by reading into the Act, wherever necessary, expressions which will restrict its prohibitions to beverage purposes.

The statute is an exercise by Congress of three different powers, to wit: (1) the power to legislate for the District of Columbia and the territories, (2) the power to regulate and control importation, exportation and interstate commerce, and (3) the power to enforce the self-executing prohibitions of Amendment XVIII.

In the *Employers' Liability Cases*, 207 U. S. 463, the contention was squarely raised that the Court should insert words of limitation where none existed. The statute in question (34 Stat. at L. 232) provided:

> "That every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between the several states, * * * shall be liable to any of its employees * * * for all damages which may result from the negligence of any of its officers * * * or by reason of any defect or insufficiency due to its negligence in its cars * * *."

After deciding that the statute was unconstitutional because it not only regulated the interstate but also the purely intrastate business of the employer (page 492), the Court then considered whether or not a limitation could be inserted restricting its operation to purely interstate commerce. It was decided that this could not be done for the reason that the statute, as it stood, was valid as to the District of Columbia and the territories; that to so qualify its operation was to restrict and destroy its operation as to the District of Columbia and the territories, or, in the language of the late Chief Justice (then Mr. Justice White), at page 501,

"To write into the act the qualifying words, there-

fore, would be but adding to its provisions in order to save it in one aspect, and thereby to destroy it in another; that is, to destroy in order to save and to save in order to destroy."

The Act, as it now stands, is valid as to those jurisdictions wherein the power of legislation of Congress is plenary, and as to those acts, such as importation and exportation, over which the power of Congress is plenary. To eliminate the prohibition against gift or delivery is to save the Act for application within the states, but to destroy it as to the District of Columbia and the territories. So also as to implying a limitation, writing into the statute after every prohibition the words "for beverage purposes."

The contention made in the *Employers' Liability Cases* has been made in other cases, but in a slightly different way. It has been contended that although the statute was unconstitutional as regards some, it could, nevertheless, be enforced as against others. That is, that although the Act is unconstitutional in that the broad prohibition on sale contained in Sections 3 and 6 and the penalty imposed by Section 29 on any sale in violation of Title II were beyond the powers of Congress to enact, nevertheless, the prohibition and the penalty may be applied to a sale which is actually for beverage purposes.

In *U. S.* v. *Reese*, 2 Otto 214, the statute in question (Act of May 31, 1870, 16 Stat. at L. 140) prohibited and penalized an election official who, under certain conditions, refused to receive and count the vote of a citizen. Another section provided for the punishment of anyone who, in short, deprived a citizen of his vote by force, threats, etc. Neither section limited its operation to acts which were violative of Amendment XV. The Court declined to read into the statute the required words of limitation. The language of the sections was broad enough

to comprehend within its terms the acts prohibited by the natural meaning of the words employed therein, if Congress had had any power to punish such acts, and no attempt was made to provide specifically for the offenses which Congress did have power to punish. The Court, speaking through Mr. Chief Justice Waite, said, at page 221:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. * * *
>
> To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

James v. *Bowman*, 190 U. S. 127, was an appeal from a judgment granting a writ of habeas corpus to a person who had been indicted for bribing negro voters to refrain from voting, in violation of Sec. 5507 R. S. That section read as follows:

> "Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats, shall be punished as provided in the preceding section."

The indictment charged that the persons bribed and intimidated were negro voters and that the election was held in a certain congressional district and was to elect a representative to Congress, but no allegation was made that the bribery was because of race, color, or previous condition of servitude. In affirming the judgment, the

Court, speaking through Mr. Justice Brewer, said, at page 139:

> "But the contention most earnestly pressed is that Congress has ample power in respect to elections of Representatives in Congress; that the election which was held, and at which this bribery took place, was such an election; and that therefore under such general power this statute and this indictment can be sustained. The difficulty with this contention is that Congress has not by this section acted in the exercise of such power."

And again, at page 142:

> "The limits of its (Congress') power are in respect to elections in which the nation is directly interested, or in which some mandate of the National Constitution is disobeyed, and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit."

An exactly parallel case exists with reference to the Prohibition Act. Congress has not pretended to prohibit and punish sales, for instance, for beverage purposes, but it has made the offense any sale in violation of the provisions of Title II. The result is a "drag-net" statute which the Court is invited to reconstruct and rewrite in such a way that it shall be not only *valid* legislation, but also *the* legislation which Congress would have enacted if it had confined itself within its constitutional powers.

In *U. S.* v. *Dewitt*, 9 Wall. 41, this Court had before it a statute (Act of March 2, 1867, Sec. 29, 14 Stat. at L. 484) which prohibited, among other things, the mixing for sale of naptha and illuminating oils, and the selling or offering for sale of such a mixture. The second question certified was whether or not the said section was constitutional. After deciding that such a statute was a police

regulation, the Court answered the question in the negative, except so far as the section operated within the United States, but without the limits of any state. In other words, the Prohibition Act, as it stands, is valid as to the District of Columbia, the territories and the Indian country and should be restricted in its operation to those places.

To recapitulate briefly, Amendment XVIII, by its self-executing provisions, prohibits but five transactions in intoxicating liquors, and those five only when done for a specific, to wit: beverage purpose.

On the analogy of the cases under Amendments XIII, XIV and XV, Congress acquires a power of enforcement which must be restricted within the scope of the self-executing prohibitions.

Congress cannot, under the guise of the enforcement power, infringe upon the police power of the states and assume the power to legislate upon matters which have been expressly reserved to the states by Amendment X and which have never been granted to Congress. Such usurpation, if permitted, would result in the absorption by Congress of the police power by means of gradual encroachments, for the reason that a power in Congress to prohibit a non-beverage use would, if it existed, immediately become superior to the power of the states to permit such use.

No necessity exists for the assumption by Congress of the power to legislate with respect to transactions other than the five prohibited by the amendment, or with respect to them when done for non-beverage purposes, for the reason that the power of Congress to penalize the said five transactions for the prohibited purpose, under whatsoever guise they appear, is ample to enforce the terms of Section 1 of the amendment, and the states still have

the power to regulate all transactions but the said five and all purposes but beverage.

The Act, being broader in its scope than the amendment, is therefore unconstitutional and cannot be saved by any process of construction.

We, therefore, respectfully submit, that, since the plaintiffs in error can never be convicted under this indictment, the judgments of conviction should be reversed and the cause remanded with directions to dismiss the indictment.

Point III.

Errors predicated upon the fact that the trial court entertained an erroneous theory of the case, resulting from a failure to appreciate that the question of fact in the case was limited to the identity of the perpetrators of an admitted crime.

I.

The erroneous theory entertained by the learned trial court and by the government.

The trial of this case proceeded upon an erroneous theory. The theory entertained by the learned trial court was that the approvers were exactly like other witnesses and could be attacked to no greater extent.

This theory made its first appearance, on the trial, when the defense was restricted in its investigation of the liquor activities of the approver Mickey Frank, and was forced to remain content with the admission of the witness that he had once sold liquor. The theory likewise made its appearance when the defense was not permitted to show that Miller had previously brought a carload of whiskey to Chicago, when it was not permitted to disclose other liquor deals of Joy and Miller and when it was not permitted to inquire into Joy's negotiations with witnesses. The theory appeared again when the defendants were not permitted to prove a variance. This theory also showed itself in the charge to the jury, when the court declined to charge the jury on the theory of the defense; declined to give the requested instruction on accomplices, while the charge which the court did give to the jury on the matter of accomplice testimony was insufficient and erroneous; and gave an affirmative instruction which misdescribed the charge in the indictment.

The foregoing errors have been specified in detail at pages 12 to 16 hereof.

II.

The case should have been tried on the theory that Joy et al. were, in effect, on trial to the same extent as the defendants, and the defendants should have been permitted to prove that the approvers were the real culprits.

A. The theory of the defendants was that Joy and the rest of the approvers were the guilty parties and were trying to shift the crime onto the defendants.

When the prosecution contended that Heitler, Perlman and Greenberg brought the car to Chicago, the defense answered that Joy and Miller were the guilty parties. So also the defense contended that it was not Heitler, Perlman and Greenberg who were directing the trucks around 63d street, but Joy and Miller; that it was not Heitler who led away Sergeant Judge and bribed him, if any bribe were given, but Joy himself; that it was not Greenberg who was checking at the car, but Joy; that it was not Heitler, Perlman and Greenberg who sold the liquor, but Joy and Miller. The defense contended, in short, that the entire story of the approvers was invented, so far as concerns the defendants, in order to win immunity and to get revenge, in which the approvers seem to have been entirely successful.

Cases involving approvers as witnesses may be divided into two classes, to wit:

(1) Those in which the prosecution admits that the approvers committed fact "A" and contends that the defendants committed fact "B." The defendants contend that fact "B" was never committed, or if it was committed, that someone other than they committed it, no attempt being made to charge the approvers with fact "B."

(2) Those in which the prosecution admits that the approvers committed fact "A" and contends that the defendants committed fact "B." The defendants admit the commission of fact "B," but contend that the approvers, and not they, are guilty of the commission thereof.

Thus, in cases of the first class, aside from promises of immunity, the questions would be exactly the same were the witnesses not approvers. An example of such cases, assuming federal jurisdiction, would be a conspiracy between the approver, a woman, and the defendant, a man, to commit the crime of rape. The approver is admitted to have enticed the victim to the place of the commission of the crime, and fact "B," the act of rape, if committed at all, must have been committed by the defendant.

But in cases of the second class, the sole inquiry is, *who* committed fact "B"? An example of such cases is where the approver, a man, is admitted to have enticed the victim to the appointed place and the defendant, a man, is accused of the actual rape. The defense is, that having so enticed the victim, the approver also committed fact "B," the actual rape. The issue to be tried by the jury is, not whether fact "B" was committed, but who committed it.

The following general observations may be made upon cases of the second class:

(1) The approvers do not have to invent much of the story. They can tell the truth, the facts as they actually occurred, except that wherever, in a truthful narrative, the names Joy and Miller would be used, they must substitute Heitler, Perlman and Greenberg.

(2) Cross-examination, the great protection against mistaken or perjured testimony, is practically worthless, because the witness *is actually telling the truth,* except for the mere substitution of names.

(3) Cross-examination, if of any value, is restricted to minor details which might not impress the jury. Thus, Joy and Miller both agree that Ambrosi had $2,780 which eventually got into the hands of Perlman. Joy states two different routes over which the money travelled, while Miller adds a third. The practiced eye sees that here is a place where the substitution of names is not enough. The approvers must *invent* something, a minor something which they probably had not thought of before. From the nature of the case, however, the very things which stamp upon their testimony the mark of perjury, are inconsequential in the eyes of the jury. What layman, in the face of the agreement on the ultimate fact, that Perlman got the money, is going to remember that the approvers contradicted themselves and each other on *how* he got it?

(4) Practically the sole defense of the defendants is an affirmative one. They cannot rely upon a failure of proof. They must convince the jury, upon the entire evidence, that the approvers, and not they, committed fact "B." Hours of instructions on the burden of proof and the presumption of innocence will not remove from the mind of the layman the desire to have answered this question—if the defendants did not commit fact "B," who did?

We apprehend, however, that it is not permissible merely to have a theory. We understand the cases to be to the effect that the theory must find support in the facts before it can be urged. Before discussing the legal points involved, the first inquiry must be, do the facts in the record lend support to the theory of the defense? Because if they do not, a discussion of legal points is of no avail.

B. The facts in the record, as made by the government, support the theory of the defense.

We forbear to reiterate the inconsistent statements of the approvers as these have been sufficiently set forth in the appendix. These inconsistencies and self-contradictions in subordinate facts, in and of themselves, are sufficient to point to a perjured tale. In considering this point, we do not ask the Court to believe or even to consider the testimony of the defendants themselves or their witnesses, for we are satisfied that the prosecution itself has introduced sufficient evidence to point to Joy and Miller as the arch-conspirators. The record first discloses these facts: Not a single word or document exists in this case which implicates the defendants, except the words of approvers. No attempt whatsoever was made to impeach a single witness for the defense. Not one word exists in this record to show that Mandel Greenberg was even thought of as being implicated until one and a half months after the commission of the crime. Not one drop of this liquor was traced to either Heitler, Perlman, Greenberg, McCann or Quinn, nor was a single truck traced to them, although the government was in possession of the license numbers of all the trucks which hauled liquor from the car (Rec. 98) and by means of a license number taken by Koeller (Rec. 98), a second-hand dealer in automobiles (Rec. 153), an attorney (Rec. 154), an investment company (Rec. 154, 157), two banks and a telegram from the Secretary of State (Rec. 158), the government found out that one of the trucks at the car belonged to the son of, and had been paid for by, the defendant O'Leary; and by a process of working from another license number (Rec. 98), to the truck driver (Rec. 156) and into an apartment by means of a search warrant, the government discovered therein, on the premises of the co-defendant McGovern, certain remnants of cases and

certain pints of the whiskey here involved (Rec. 158-9). The above facts, or absence of them, while sufficient to cause a reasonable doubt as to the guilt of the defendants, may not, however, point affirmatively to the approvers as the perpetrators of the crime.

Other facts adduced by the government do, however, appear which point affirmatively to Joy and Miller. Such is the alleged arrangement Joy made with Heitler, Perlman and Greenberg on Saturday, whereby Joy and Miller were to be paid back their money, fifty per cent in cash on Monday and fifty per cent in liquor a few days later (Rec. 126).

According to his story, Joy was given the telephone numbers of Perlman and Heitler and was instructed to call them up "if anything happened during the night" (Rec. 126). On Saturday afternoon, looking forward, what was it that was expected to happen during the coming night? The record gives no clue. But at the time of trial, looking back to the events of Saturday evening or early Sunday morning at the Englewood station, much had happened that night and what more natural than that Perlman should now be credited with a prescience which he modestly disclaims? But Joy went to bed perfectly satisfied that he would get his money (Rec. 128). When Miller called to take him to see the police, did he do the natural thing and call up Perlman or Heitler? He did not. When he met Heitler in the Englewood station, did he do the natural thing and attempt to evade until he got a chance to talk with Heitler? He did not. The sight of Heitler was the signal for a volley of curses and vilification (Rec. 128). Is that an act of a man who had just made an arrangement to get back $20,000? Joy's sole ambition at that time was to get back his money. He would have taken it as he sat on the witness stand if it had been offered him (Rec. 132). Would he have jeop-

ardized this "arrangement" without ascertaining if Heitler had backed out? The answer is obvious. More remarkable still, however, is the fact that *Joy never said a* word to Miller about this "arrangement," whereby these two were to get their money back (Rec. 149).

The threat of death by Heitler to Frank is merely the conventional touch of local color. To expect us to believe that Heitler really drew his finger across his throat in a room ten feet square, in the presence of several police officers, is to presume too much upon our credulity.

Miller said that he saw Heitler's machine, which was a Hudson (Rec. 257), near the car at Gresham. Miller's machine was there and he admits it (Rec. 144). By substituting Heitler for Miller, the ultimate fact is established—Heitler's machine was there. But how did he know it was Heitler's, except by observation? He observed closely enough to see the ultimate fact, the ownership of the machine, but this dealer in second-hand automobiles, perfectly familiar with a Hudson, could not recognize the make of this particular Hudson (Rec. 150). If he had in fact seen that machine there that night, he must have noticed what kind it was.

It is to be noted that the two Franks testified to many meetings with Perlman, Heitler and Greenberg, but at none of these meetings does anything appear to have been said, nor do the several gentlemen standing at Mickey's bar, in whose presence Heitler and Mickey discussed hundreds of cases of whiskey, appear to have evidenced the least bit of interest or enthusiasm over this shipment, nor to have inquired as to the possibility of their finding solace in a few pints thereof (Rec. 156). We suggest that the reason the two Franks testified that nothing was said was that they were unable to invent fictitious conversations. We are expected by these approvers and by the contentions of the government to be-

have many highly improbable things. One thing, however, which we are asked to believe is absolutely impossible of occurrence—and that is, that four gentlemen, by name Morris Frank, Michael Hatter, Nathaniel Perlman and Mendel Greenberg met; that one of them delivered $7,000 in cash to another, told him that that was all he was going to get, and not a word was said by any of the other three (Rec. 112).

Against testimony of the kind above described, the defendants have some measure of protection in cross-examination, subject, however, to the limitations hereinbefore mentioned, *i. e.*, the contradictions will not be as to the ultimate fact, the payment of money, but will be in what may appear to be minor details, how, when, to whom the money was paid.

Where, however, no more is required of the witnesses than a mere substitution of names, what protection does cross-examination afford? Jay said that Hatter led Judge away from the car (Rec. 156). Can it be expected that he will, on cross-examination, admit that it was he, and not Hatter, who committed the act, or can Judge be expected to take the stand and testify that it was Jay who lulled him, if a lulls were given, and not Hatter? Other facts exist, however, which show that it was Jay and not Hatter. Kadler said on direct examination that the man who led Judge away wore a diamond pin and ring (Rec. 66.) Jay admits wearing these articles of jewelry (Rec. 159). Was it Jay, who was never brought before Kadler, or was it Hatter, whom Kadler failed to recognize? (Rec. 183).

Jay and Miller said that Hatter, Perlman and Greenberg were directing the trucks around Old street, while Jay remained several hours waiting inside his truck (Rec. 154, 166). But Greenwell, the truck driver, said that Jay went off immediately upon his arrival and was

not seen again for several hours (Rec. 139). Where was he? Where, but at the rendezvous giving directions?

Joy testified that Heitler said he had Louisville whiskey and expected a carload every week (Rec. 123). Who gave Andreoni a receipt for his money? *Joy* and Miller (Rec. 124, 137). *Joy* and Miller purchased those twenty cases from Heitler, Perlman and Greenberg at $130 per case or for $2,600 in all (Rec. 123). They were sold to Andreoni for $2,700 (Rec. 124), a profit of $100. Can anything be more silly than Miller's excuse for giving the receipt? (Rec. 150.) "He had so much confidence that the deal was on the square that he had no hesitancy in obligating himself to make good *any* loss Andreoni sustained." In the presence of the alleged real sellers, Miller, for $100, obligates himself to pay out $2,700, if anything went wrong.

Consider also the testimony of Greenwald. *Joy* told him that he, *Joy*, had a carload of whiskey coming and that he had a permit to haul it (Rec. 161). Why should *Joy* say that he had a carload and a permit? Why, if it were not a fact that he did have both? It should be remembered that this statement was made to Greenwald *before* the holdup, and *before* there was any necessity that *Joy* find a scapegoat in order to win immunity for himself.

Joy said that he made the deal in Perlman's saloon. Why did he brazenly deny knowing the whereabouts of Adolph Georg's saloon (Rec. 120), although he was immediately forced to admit that he frequented it? Mickey Frank gives the answer. When Mickey Frank went to Perlman's on Saturday, he went down two steps (Rec. 181). Mickey Frank did go to Perlman's on Saturday, but he first went down two steps, which is how one enters Adolph Georg's (Rec. 181), Sonny Joy's hangout (Rec. 181, 187). Why did Mickey Frank completely contradict

on the trial the statement he made to Captain Ryan? Why was Friday a more propitious day than Thursday? Why did he "forget" $500 and five cases? Nobody knows but Frank.

Morris Frank admits one sale of ten cases (Rec. 102), but Harry said, speaking of the purchase of 100 cases, that Morris had never bought that much *before* (Rec. 117); Greenguard, a thirty dollar a week waiter (Rec. 119), took $3,250 from a safe deposit vault to "invest" in liquor (Rec. 120); Kiser, who, according to Mickey Frank, has no business, paid $3,250 for whiskey (Rec. 202); Joy, an ex-bartender (Rec. 137), with no visible means of support (Rec. 127), but living on the bit of money he had saved (Rec. 131). Were these men in the liquor business? Moses said that he understood Joy and Miller would buy liquor (Rec. 271); Todd had bought liquor from Joy several times (Rec. 272); the Mid-City Express had hauled other liquor for him (Rec. 141). Where is the evidence to show that the defendants also were engaged in the liquor business?

If the above facts, proved by government witnesses, be not conclusive, the deficiency is supplied by the intense hatred of the defendants displayed by Joy on the stand (Rec. 1354) and by his conduct with witnesses. He sought to subpoena Greenwald, to make him say that he had seen "Hatter and them" at the car, when in fact he had not (Rec. 142), and he exhorted him generally to "pass the Jews" (Rec. 141). He sought to influence the testimony of Mr. Grimsley (Rec. 108). He corrected Miller in his statements (Rec. 136). The final touch appeared in the rebuttal. Joy knew that he was on trial and when his minions was hanging in the balance, he went out and procured Todd to be a witness (Rec. 272), even though it was at the expense of adding one more item of perjury to his already overburdened record (Rec. 136).

C. The case was, therefore, such that the approvers as well as the defendants were on trial.

No case, we submit, can be found in the books which presents a *clearer or sharper* conflict as to the perpetrators of the crime. The basic facts were admitted—there was a conspiracy to bring liquor to Chicago and to sell it here. The case falls within the second of the two classes of cases involving approvers as witnesses, that is, it is a case where fact "B" is admitted and the sole question is, who committed it. For the purpose of answering this question, the approvers were on trial to the same extent as the defendants. In *Harper v. State*, 165 Ind. 322, 114 N. E. 4, the defendant was accused of rape on a feeble-minded, unmarried female, one Eva Mosier. She was delivered of a child before trial and fact "B," the fact of sexual intercourse, was thereby conclusively established. She testified that she had had intercourse with no one but the defendant. One Ella Foutz was a witness and gave very damaging testimony. The defendant denied that he had committed the act of intercourse and on motion for a new trial offered newly discovered evidence, to wit: The testimony of two witnesses who would swear that, about the time of the alleged intercourse between the defendant and Eva Mosier, they looked through the window of a certain vacant house and saw Ella Foutz and Eva Mosier in the act of sexual intercourse. The motion for a new trial was denied, but on appeal the judgment was reversed and the cause remanded with directions to grant a new trial. We take it to be uncontroverted that testimony that others had been guilty of the same crime would in no way exculpate the defendant, and if that had been the only point made in favor of the admission of the newly discovered evidence, we know of no theory upon which the evidence would have been admissible. In view of the fact, however, that Eva Mosier had testified the

she had had intercourse with no one but the defendant, the newly discovered evidence tended to show that Elba Foutz was the guilty party and was attempting to shift the crime onto the shoulders of the defendant.

Kelley v. State (Tex. Cr. App.) 216 S. W. 188, presents a case very similar to the instant case. In that case, the defendant was convicted of arson, testimony incriminating him being given by one Le Blanc. The defendant testified that he had discovered the fire and had worked to put it out. The theory of the state was supported by certain witnesses who drew inferences and had their suspicions aroused, while the defendant's story was supported by witnesses who came upon him as he was working to put out the fire. The defendant, on motion for a new trial, offered newly discovered evidence, to wit: The testimony of two witnesses who saw the defendant in his house and immediately thereafter saw Le Blanc and two unknown persons near the place where the fire occurred. The motion was denied, but on appeal the judgment was reversed and the cause remanded with directions to grant a new trial, the Court, speaking through Mr. Justice Morrow, saying, at page 189:

> "Recalling that Le Blanc admittedly upon some motive was one of the incendiarios, the new evidence, putting him and companions whose identity was not disclosed upon the trial in proximity to the crime, both in time and locality, was such, we think, as might have been regarded by the jury as important in accounting for the fire in a manner consistent with the innocence of the appellant.
>
> Particularly is this true in view of the marked conflict in the evidence given by the witnesses for the state and the defendant, who, so far as the record shows, were not in any way interested in the result of the trial."

The instant case differs from the *Kelley* case only in this: in the instant case not one disinterested witness was brought forward by the government to prove even inferences and suspicions. The few disinterested witnesses who were brought forward all testified to facts which implicated Joy even more than his own testimony, and failed to identify the defendants, although offered ample opportunity. The offered evidence in the *Kelley* case would not be admissible if its purport were merely to show that Le Blanc and his two companions were also implicated in the crime. It only became admissible because the investigation was not as to the existence of fact "B" (the fire), but was as to the perpetrators of the crime.

In *Mendoza* v. *State* (Tex. Cr.) 225 S. W. 169, the defendant was accused of stealing twenty-one small turkeys. Refina Gonzales and his wife both testified that the defendant and one De Leon had borrowed a sack, caught the twenty-one small turkeys and made off with them. The defendant denied the theft and the turkeys were never found in his possession. The turkey hen, however, was found on the premises of Gonzales. After the evidence was closed, but before the argument was completed, the defendant offered evidence to prove that Gonzales had offered to pay for the turkeys if the owner would not take the matter to court. The trial court declined to receive the evidence, and on appeal the judgment was reversed and the cause remanded on the ground that the trial court should have exercised its discretion under the statute, reopened the case and admitted the testimony, which was

> "favorable to the appellant tending to exculpate him, tending to discredit Gonzales and to emphasize the suspicion cast by the circumstances upon him as the offender" (p. 170).

In *Ex parte Gilstrap*, 14 Tex. App. 240, the defendant was convicted of the murder of one Chiffet. One Criner was the most important witness and by him most of the criminative facts were established. The evidence offered was that Criner had said, immediately after the killing of Chiffet, that he, Criner, had shot Chiffet; that Criner, a day or so before the killing of Chiffet and Guilliot, had said that he would have his son Alfred whip Guilliot. The evidence was excluded on objection that no predicate had been laid for the impeachment of the witness and upon the further ground that the evidence was not material. In reversing and remanding, the Court, speaking through Mr. Justice Hurt, said, at page 265:

> "Was a predicate necessary? By no means. Criner being a witness, applicant had the right, without predicate, to introduce any fact or circumstance tending to connect him with the crime, which would be admissible if Criner himself had been on trial."

In Texas, a conviction cannot be had upon the uncorroborated testimony of an approver; in the federal courts, it can be. But the fact nevertheless remains that the approver is on trial as much as the defendant, and it ill becomes the government to seek to limit the evidence which tends to discredit the approvers and to make it more probable that they, instead of the defendants, committed the crime.

III.

The excluded evidence should have been admitted because it tended to prove that the approvers, and not the defendants, were the real culprits.

The evidence sought to be elicited by questions addressed on cross-examination to the approvers was also

admissible as laying the foundation for impeachment, Mickey Frank having testified that before that he had sold but ten cases (Rec. 103), Joy having testified that he had not been engaged in the illegal traffic in liquor (Rec. 131, 132), and Miller having testified that he had not brought a carload of whiskey to Chicago (Rec. 149).

We prefer, however, to discuss the excluded evidence in its more substantial and important bearing upon the case.

It is not necessary, in order that a fact be relevant and admissible, that it be of high probative value; it need be only of sufficient force to warrant its being considered by the jury (1 Wigmore on Evidence, §29; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44). The general rule would seem to be that any relevant fact is admissible if, taken in connection with other admitted facts, or with an offer of proof of other facts, it tends to incriminate another and to exculpate the defendant (*People* v. *Myers*, 70 Cal. 582, 584, 12 Pac. 719, 720; *McDonald* v. *State*, 165 Ala. 85, 89, 51 So. 629, 631).

We admit that the defendants do not come within the rule if the facts to be elicited merely tend to show that a third person had a motive, or merely an opportunity to commit the crime (*Horn* v. *State*, 12 Wyo. 80, 129, 73 Pac. 705, 715; *Irvin* v. *State*, 11 Okl. Cr. 301, 331, 146 Pac. 453, 464; *Fields* v. *U. S.* (C. C. A.) 221 Fed. 242, 244; *Griffin* v. *U. S.* (C. C. A.) 248 Fed. 6, 9). So also of an attempt merely to show that others besides the defendant were implicated in the crime (*Patrick* v. *State*, 45 Tex. Cr. 587, 588, 78 S. W. 947). The ultimate fact sought to be established by the defense was that Joy and Miller, were the conspirators who brought the liquor to Chicago and sold it, and that the defendants were brought into the case as the result of a conspiracy among the guilty to foist upon them the commission of the crime.

Does the excluded evidence tend to show that the approvers were the guilty parties and that the defendants were not? We make no claim that the excluded evidence, in and of itself, without reference to other facts in the record, does make this showing. The point made is that the excluded evidence, taken in connection with other facts in the record, does tend to show that it was more probable that the car was brought to Chicago and the whiskey sold by the approvers, rather than by the defendants.

There is no evidence in this record, aside from the words of the approvers, which shows that the defendants ever sold or even possessed a drop of liquor illegally. There is evidence that Perlman's place was raided (Rec. 193), but there is no evidence that any intoxicating liquor was even found therein. There is evidence that a temporary injunction was issued, on *ex parte* hearing, against the partners of Quinn (Rec. 261), but there is no evidence that Quinn sold or even possessed liquor.

There is, however, evidence in this record to show that Joy and the other approvers were at least casually acquainted with the fact that it was still possible to sell intoxicating liquor if one tried very hard. How is it possible to say that evidence to show that they had engaged extensively in the illegal traffic in liquor; that Miller had brought other carloads of whiskey to Chicago, would not have influenced the jury to believe the defendants and their unimpeached witnesses, rather than the self-impeached approvers? As was said by the Court in *State v. Harris*, 153 Ia. 592, 596, 133 N. W. 1078, 1080, in speaking of evidence of a similar general character:

> "Neither the trial court nor this court can say that such evidence was of little consequence, and would not have been given consideration by the jury. It is the jury that is to determine the weight of such evidence, and, when the defendant is denied the right

to present his case to the jury, he has not received the fair and impartial trial guaranteed him by the law."

The defendants, by the rulings excluding evidence, were, we submit, deprived of an opportunity to present fully a vital part of the theory of their defense, namely, that Joy and Miller, in the course of their wholesale illegal traffic in liquors, brought this carload of whiskey to Chicago and then peddled it to Todd, Mickey Frank and others.

IV.

The defendants were entitled to a charge presenting to the jury their theory of the case and the trial court erred in refusing such requested charge.

The learned trial court charged the jury upon the theory of the government and further charged the jury that they should not concern themselves with any individual not named in the indictment, as they were of interest so far as the case was concerned only as their connection or story tended to establish the guilt or innocence of the defendants (Rec. 295). The learned trial court then refused the request of counsel to place before the jury the theory of the defense and to instruct the jury to consider the approvers to the extent of determining whether they or the defendants were the conspirators. In other words, the learned trial court not only declined to admit evidence tending to prove that the approvers were the conspirators, but it also refused to permit the jury to consider whether or not the evidence already in the case showed that the approvers were the conspirators and that the defendants were not.

The defendants were entitled to have their theory of the case presented to the jury (*Stevenson* v. *U. S.*, 162

U. S. 313, 323; *Bird* v. *U. S.*, 180 U. S. 356, 361; *Hendrey* v. *U. S.* (C. C. A.) 233 Fed. 5, 18; *State* v. *Gallivan*, 75 Conn. 326, 338, 53 Atl. 731, 733; *Payton* v. *State*, 4 Okl. Cr. 316, 111 Pac. 666).

In *Hall* v. *State*, 69 Tex. Cr. R. 332, 153 S. W. 902, the State offered evidence to show that the defendant was guilty of the crime of theft. The defendant offered testimony to show that the guilty person was not the defendant, but was one Troy Lane. The trial court refused to charge on the defendant's theory of the case. In reversing the judgment of conviction, the Court, speaking through Mr. Justice Harper, said, at page 333 of the official report:

> "Under an unbroken line of decisions this court has held that where the testimony raises the issue that another person may have committed the offense, this issue must be submitted to the jury in the charge of the court, and where a special charge is requested and refused, this will present reversible error."

Under the special circumstances of this case, the error was made more serious than in any of the cases cited by the fact that the court, in its charge, had grouped together facts which tended to support the government's theory and had not only failed to charge on the theory of the defense but had even restricted the jury as to the extent to which the jury could give consideration to the approvers and their testimony (*Francis* v. *State* (Tex. Cr. App.) 55 S. W. 488).

> "Justice and the law demanded that so far as reference was made to the evidence, that which was favorable to the accused should not be excluded." (Mr. Chief Justice Fuller in *Allison* v. *U. S.*, 160 U. S. 203, 212.)

V.

The court erred in giving the instruction on accomplice testimony and in declining to give defendants' requested instruction "C," such instructions having an important bearing on the defendants' theory of the case.

A. The instruction given was erroneous in that it failed to advise the jury against convicting unless corroboration was found in untainted testimony; the instruction refused, on the other hand, contained a correct statement of the law.

Before proceeding further we wish to emphasize the point now being urged. It is not our contention that a conviction cannot under any circumstances be had upon the testimony of an uncorroborated approver, but, on the contrary, the requested instruction informed the jury that

> "an accomplice is an admissible witness and a conviction may be had on the uncorroborated testimony of such a witness * * *."

The state of the law relative to accomplice testimony is, we believe, as follows:

> The jury must, on request, be instructed on the dangers of accomplice testimony and must be advised against convicting on such testimony if uncorroborated. If, however, the jury, having been so advised, chooses to convict, the judgment of conviction will not be reversed because of that fact.

The point which we here make, is not that the jury convicted upon the uncorroborated testimony of approvers, but that they were not advised against so convicting.

The dangers surrounding accomplice testimony are too well known to warrant discussion, especially in view of the fact that they are well illustrated in the present case.

In *Reagen* v. *U. S.*, 157 U. S. 301, the Court, speaking through Mr. Justice Brewer, said, at page 310:

> "The court should be impartial between the government and the defendant. On behalf of the defendant it is its duty to caution the jury not to convict upon the uncorroborated testimony of an accomplice."

In *Freed* v. *U. S.* (App. D. C.) 266 Fed. 1012; *McGinniss* v. *U. S.* (C. C. A.) 256 Fed. 621, and *People* v. *Aiello*, 302 Ill. 518, judgments of conviction were reversed where the testimony was that of uncorroborated accomplices.

Recurring to the instruction given, we find, as the Court of Appeals found in the *McGinniss* case, that no word of caution is contained therein except general language applicable to any witness (Rec. 291), plus the further statement that accomplice testimony was not entitled to the same weight as the testimony of an innocent party, that the jury would be required to approach the testimony of an accomplice with some caution and

> "would be required to scrutinize it closely, not reject it, but scrutinize it carefully and only cautiously accept it."

On the other hand, the requested instruction, while reducing to a minimum the rights of a defendant, correctly stated the law. This instruction first informed the jury that certain witnesses, naming them, might be accomplices. A definition of accomplices was then given to the jury. The instruction continued, not by instructing the jury that the named witnesses were accomplices, but by telling the jury that if the jury found such witnesses to be accomplices, nevertheless, an accomplice was an admissible witness and a conviction might be had upon his

uncorroborated testimony. The instruction then contained a caution to the jury, and, finally advised them not to convict unless the testimony of the accomplice was corroborated. The instruction ended with a statement as to the rule of corroboration.

The instruction given by the court, on the other hand, was insufficient, it is submitted, in that the attention of the jury was not sharply directed to the dangers of accepting accomplice testimony at its face value.

The learned trial court, in its opinion (Rec. 39), cites the *Caminetti* case, 242 U. S. 470, as supporting its ruling. In this case the opinion of the Court disposes of three cases. The instructions requested in the *Stripp* and *Caminetti* cases appear in 220 Fed. at p. 352, and, as stated in the opinion of the Circuit Court of Appeals, were as follows:

> "That the jury should determine from the evidence and circumstances whether Mamie Warrington and Lola Norris, or either of them, were accomplices of the defendants, and that, if it was found that they were, the testimony of an accomplice should be received with caution and weighed and scrutinized with great care by the jury, and that the jury should not regard the testimony of an accomplice, unless she is confirmed and corroborated in some material parts of her evidence."

The Circuit Court of Appeals disposed of this point on the following grounds:

> "First. A refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed (Citing *Edington* v. *U. S.*).
>
> Second. We are of the opinion that as to the counts of the indictment on which the defendants were found guilty neither Mamie Warrington nor Lola Norris was an accomplice * * *."

The instruction requested in the *Hope* case appears in [illegible] Fed. at p. [illegible], and was as follows:

> "The defendant requests the court to instruct the jury that the girl, under the facts and circumstances, is an accomplice, and that it is a rule of law that before the jury can take the testimony of an accomplice, it must be corroborated by other testimony of other witnesses, or by facts and circumstances which will convince the jury beyond a reasonable doubt."

The Circuit Court of Appeals disposed of this point on the following grounds:

> "First, the girl was not an accomplice (citing authorities); second, even if she were an accomplice, the request as framed states the requirements of corroboration much too strongly."

(The case of *Edwards v. U. S.*, [illegible] U. S. [illegible], is much relied upon to sustain the contention that it is not reversible error to refuse to give an instruction on accomplice testimony. The instruction asked in this case was as follows:

> "I charge you that if you believe the testimony of the witness, Frank Watts, then that said witness was an accomplice in crime with the defendant, and I instruct you that before you can convict said defendant, the testimony of the witness, Frank Watts, should be corroborated by the testimony of at least one witness or strong corroborating circumstances."

This Court decided the point on the last that the instruction invaded the province of the jury, saying (page [illegible]):

> "It is substantially the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error.")

A consideration of the instructions requested in these cases discloses the following faults:

(1) In the *Diggs* and *Caminetti* cases, the witnesses were not accomplices. The requested instruction was also erroneous because demanding that the jury disregard accomplice testimony unless corroborated.

(2) In the *Hays* case, the instruction assumed as a fact that which was not a fact, to wit: that the woman transported was an accomplice. The instruction was further erroneous as stating that before the jury can believe an accomplice, the jury must find corroboration.

(3) In the *Holmgren* case, the instruction was erroneous because it assumed as a fact that which was controverted.

In deciding the *Caminetti* case, this Court, speaking through Mr. Justice Day, said, at page 495:

> "We agree with the Circuit Court of Appeals that the requests in the form made should not have been given. In *Holmgren* v. *United States,* 217 U. S. 509, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. While this is so, there is no absolute rule of law preventing convictions on the testimony of accomplices if juries believe them."

From the citation of the *Holmgren* case and from a knowledge of the instructions requested in the other cases, we submit that this Court, in the *Caminetti* case, merely decided that a defendant cannot complain of the failure of the court to give a proper instruction on accomplice testimony where none was requested.

We submit for consideration the belief that the uncertainty which has followed the ruling in the *Caminetti*

case has resulted from the juxtaposition, in the opinion, of two sentences which treat of two distinct phases of the question now under consideration.

The opinion first states that the better practice is for courts to advise the jury to require corroboration before giving credence to accomplice testimony. The situation here treated arises, in point of time, before the jury retires to consider its verdict, and the question is, whether or not the defendant is entitled to an instruction on accomplice testimony.

The opinion then continues to the effect that, notwithstanding the advice of the court, the jury may, nevertheless, convict on accomplice testimony, if it be believed by the jury. The situation treated in this sentence does not arise, in point of time, until after the verdict has been returned and the question then is, whether or not the verdict can stand, based as it is on the uncorroborated testimony of an accomplice. This question is not one with which we are now concerned, for the reason that the requested instruction assumes that the answer thereto is an affirmative one.

In discussing this point on motion for a new trial, the learned trial court stated (Rec. 38):

> "Counsel for defendants contend, however, that the proposed instruction only goes to the extent of advice from the court. In other words, the proposed instruction did not require the jury to acquit unless the testimony of accomplices was corroborated, but did express the court's views on such testimony. If such proposed instruction was merely intended as an expression of the court's opinion as to the weight to be given to testimony of accomplices, it was clearly a matter of judgment on the part of the trial judge whether such expression of opinion should be given or not."

We respectfully submit that the question is not what the individual judge may think of accomplice testimony

or of the testimony of certain accomplices. Witnesses who are interested in the result of a trial may be prejudiced by reason of their interest, and a party, whether in a civil or criminal case, is entitled to an instruction informing the jury that they may take into consideration the interest of the witness; and the party is entitled to this instruction whether or not the presiding judge believes that the interest of the witness has affected his testimony. So also a defendant is presumed to be innocent until his guilt is established, and we take it that a requested instruction so stating to the jury must be given even though the judge may believe that particular defendant is guilty.

The law considers that the testimony of approvers is most unsatisfactory and is fraught with danger. We respectfully submit that it is for the jury, and not for the judge, to say whether or not in any particular case the approvers may or may not be credited, since the credibility of witnesses is for the jury under proper instructions. Where there is a conflict in the evidence, we need no citation of authority for the assertion that no court, in any kind of a case, may direct a verdict in favor of one side or the other. The court, in any event, cannot direct the verdict against a defendant in a criminal case. If, however, the judge be permitted to choose the rules of law, which are to be applied in the trial before him, as he determines in his own mind the guilt or innocence of the defendant, and thereby inevitably influences the jury to that belief, because a jury having been instructed not to reject accomplice testimony will follow the instruction, does he not thereby, in effect, gain the power of directing a verdict against the defendant? If he may decide that the jury is not to be advised to seek corroboration before conviction, may he not decide that the particular approvers in question, being worthy of belief, are to be

considered as other witnesses and their testimony given the same weight? And having so decided, on the theory entertained by the learned trial court, could he be required to even direct the jury's attention to the difference between accomplice and other testimony?

The instruction requested on accomplice testimony is not one which presents to the jury the judge's opinion on the credibility of the witness any more than the instruction on the presumption of innocence presents to the jury the judge's opinion as to the innocence of the defendant. There have been established certain general rules of law which are applicable to all cases. An orderly administration of justice demands that trials be conducted in accordance with these general rules and the Constitution demands that the final result be left in the hands of the jury, not in the hands of the judge.

B. The instruction given was also erroneous in that it not only failed to state correctly the rule of corroboration, but stated it incorrectly; the instruction refused, on the other hand, contained a correct statement of the rule of law.

The learned trial court did not define corroboration for the benefit of the jury. Instead, an illustration was used. This illustration was, in part, as follows (Rec. 298):

> "Assume, if you will that A and B are indicted and on trial for entering the house of X in the night time and with the intent to burglarize it. C appears as a witness and states that he was with A and B on the night in question and all three of them broke into the house of X and took therefrom moneys, jewelry and bonds. Now, C's testimony shows him to be a confessed accomplice. * * *
>
> Now, assume that there is other testimony,—that X testified that he and his family left home early that evening, and returned home early the next morning, and found that their house had been burg-

larized and that moneys, jewelry and bonds had been taken and the description of the goods taken corresponded with C's testimony. There would be corroboration of C's testimony."

In other words, the fact that the carload of whiskey arrived in Chicago is corroboration of the fact that the three principal defendants brought it there. It is respectfully submitted that such is not the case. The arrival of the car, fact "B," was not the fact in issue. If A says that C committed fact "B," and C says that A committed fact "B," how can fact "B," the existence of which is admitted, be evidence of who committed it?

In *Sykes* v. *U. S.* (C. C. A.) 204 Fed. 909, the approver, in telling her story, said that Sykes had hidden the stolen mail bag in the weeds by the side of the railroad. The learned Court of Appeals held that the fact that the bag was actually found there did not corroborate her testimony that Sykes was the one who put it there. In *McNealley* v. *State,* 5 Wyo. 59, 36 Pac. 824, the approver testified that the defendant had killed the cow and hidden the hide. The hide had been found where the approver had said it had been hidden. The trial court charged the jury that this fact would be strong corroboration of the approver's testimony. The Supreme Court reversed the judgment, holding that such fact was no corroboration.

The learned trial court continued in the illustration:

> "Now, assume further that another witness testified that he saw the three, A, B, and C together at a place and at an hour quite unusual and yet consistent with C's entire story. In such a case, the corroboration of details in C's story might make C's testimony most persuasive of the truth."

In other words, the fact that Joy met Heitler in Perlman's saloon at midnight on Friday, October 1st, was corroboration of Joy's story. That might possibly have

been so if the defendants had denied that fact "B" had occurred. But where the defendants admit fact "B" and admit their presence at the unusual place and hour, but say that they were there subjected to blackmail, how does their presence show that they, and not the mythical C (Joy) committed fact "B"? The court might have meant that if Miller testified to about the same ultimate facts as Joy, Miller would thereby substantiate Joy and Joy, Miller. As to this, we also respectfully beg to differ. We fail to see how, or upon what theory of law, it can be said that a story becomes more convincing because told by two or five prospective perjurers instead of by one. The corroborating testimony must, in itself, be worthy of belief and one approver cannot corroborate another approver (*Jones* v. *Commonwealth,* 111 Va. 862, 868, 69 S. E. 953, 955; *U. S.* v. *Hinz,* 35 Fed. 272, 281; *Ratcliff* v. *State* (Tex. Cr. App.) 229 S. W. 857; 16 C. J. 710, § 1453).

Corroboration, also, must be as to guilt (*Sykes* v. *U. S.* (C. C. A.) 204 Fed. 909, 913; *Jones* v. *Commonwealth,* 111 Va. 862, 869, 69 S. E. 953, 955; *Smith* v. *State,* 10 Wyo. 157, 166, 67 Pac. 977, 979; *Howard* v. *Commonwealth,* 110 Ky. 356, 361, 61 S. W. 756, 758; *Clapp* v. *State,* 94 Tenn. 186, 195, 30 S. W. 214, 216; *Courson* v. *State* (Ga. App.) 94 S. E. 53, 54; 3 Russell on Crimes (7th Ed.) 2288; 16 C. J. 701, §1434). The way in which corroboration or no is determined is by eliminating from the case all testimony of the approvers. If inculpatory evidence remain, the approvers have been corroborated (*Welden* v. *State,* 10 Tex. App. at 401). Do that in this case, and what remains to connect the defendants, or any of them, with the crime? Nothing.

VI.

The court erred in declining to admit testimony as to what Joy said to George Ortseifen in the office of the assistant district attorney.

The defense tried to prove that Joy made certain statements to George Ortseifen (Rec. 167-8). What those statements were, does not appear in the record, except that they were to show Joy's interest in the litigation, his attempt to influence the witness, and were not contradictory of anything he had said on the stand. Here is the erroneous theory in full force. Joy, the mere witness, could not be impeached by showing that he was interested, which by that time was self-evident, for this testimony was merely cumulative. But the evidence should have been admitted against Joy, the party.

Here was a man who had so little faith in his own story and his own witnesses that he was attempting to corrupt the witness of the other party. Surely, it needs no citation of authority to show that such testimony would have been admissible in a civil action between Joy and the defendants, and it should have been admitted herein as part of the defendants case, tending to show more than a mere academic interest, going so far as to show what amounted to a proprietorship over the litigation.

Beyond all question, this case was wrongly entitled. It should have been entitled

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VII.

The court erred in sustaining the objection of the government to, and in declining to admit, evidence offered by the defendants to show a variance, to wit: evidence to prove that the approvers were known to the grand jury to have been conspirators and were not unknown.

Retracing our steps for the moment, we have seen how the erroneous theory operated in the case to the great prejudice of the defendants. We now see how it originated. The government and the grand jury swallowed whole the entire story of the approvers. To them, this was a case wherein fact "B," the crime, was in issue. Little did they dream that the case was one of that extremely rare class in which the identity of the culprits was the only point in issue. Hence, the indictment omitted all reference to Joy and his friends. If the approvers had been brought to trial, all the excluded evidence would have been admissible against the approvers as defendants. Here, then, is a substantial and important harm suffered by the defendants as a result of the gullibility of the government and of the grand jury, and the failure of the latter to state truthfully in the indictment what they had discovered as a result of their investigation.

The indictment charged that the other conspirators were unknown to the grand jurors (Rec. 2), but the fact was that the approvers were known and not unknown. The defendants offered twice to prove the variance, once on cross-examination of Joy (Rec. 129-131), and once as an affirmative defense, as part of the defendants' case (Rec. 233-4). Both times, Joy and a grand juror were offered as witnesses.

The learned trial court sustained the objections of the government to the several offers of proof and refused

to admit the evidence (Rec. 131, 234). The point was also specifically called to the attention of the learned trial court by the several motions for a new trial, being point 17 of the written motions of the defendants Heitler, Perlman, Greenberg and McCann (Rec. 20, 23, 26, 30), the defendant Quinn having made an oral motion (Rec. 309), which motions were overruled and denied by the court (Rec. 321).

The learned trial court, in its opinion, commented upon the fact that counsel, on motions for a new trial, directed the argument to the failure of the grand jury to name Joy, neglecting the other approvers (Rec. 35). In our brief, filed in support of said motions, we had made the following statement, which we here reiterate:

> "The offer made on behalf of the defendants comprehended within its terms the witnesses John Miller, Morris Frank, Harry Frank, Louis Greengaard and John Fitzpatrick, in addition to Maurice Joy. The discussion in the brief will be confined to a consideration of the offer as regards the witness Joy, the other witnesses adding nothing except in quantity."

A. In the courts of the United States, a variance arising from the fact that the evidence does not support an allegation that a thing is unknown to the grand jury, is a matter of affirmative defense which can be proved by the defendant.

1. In general, a variance results from the failure of the proof to correspond with the allegations of the indictment.

Before proceeding further, we wish to emphasize the point we now raise. The point is not that the indictment is defective because of failure to name all other co-conspirators, because we admit that the omission to state names "is satisfied by the allegation, *if true,** that such

*Italics ours.

names * * * are to the grand jury unknown" (*Durland* v. *U. S.*, 161 U. S. 306, 314). Nor do we contend that the grand jury should have investigated and ascertained who the other "unknown" conspirators were. Our point is simply this: that having actually made such an investigation, the grand jury must state truthfully the result thereof. Having in fact ascertained the names of some, at least, of the co-conspirators, the grand jury must state those names in the indictment and should not be permitted to aver falsely that those names were unknown.

> "A false averment in an indictment that names were unknown savors of trickery, and is most reprehensible. A bill presented by a grand jury as a true bill should not contain averments that are known to be false" (*State* v. *Smith*, 89 N. J. L. 52, 54, 97 Atl. 780).

The point which we make has nothing to do with the allegations of the indictment as such, and we beg to disagree with the learned trial court as to the applicability of reasoning drawn from Amendment VI. Whether or not an indictment fully states an offense is determined upon demurrer before trial. The point of variance can only arise during trial and the question then is, not whether the indictment fully states an offense, but whether the proof supports the allegations of the indictment.

Whenever a variance appears upon the trial, the defendant is entitled to a directed verdict in his favor (*U. S.* v. *Riley*, 74 Fed. 210; *Naftzger* v. *U. S.* (C. C. A.) 200 Fed. 494, 501; *State* v. *Smith*, 89 N. J. L. 52, 97 Atl. 780; *People* v. *Hunt*, 251 Ill. 446, 96 N. E. 220). Thus, in the *Riley* case, the opinion in which was written by the present Chief Justice (then Circuit Judge), a verdict was directed where the evidence showed that the grand jury knew certain names which the indictment averred were unknown.

A variance is to be distinguished, also, from a mere conflict of evidence in that, as a general rule, a variance is something which appears from the testimony adduced by the prosecution, it is not something which must be proved by the defense. Thus, the charge being assault with a weapon unknown to the grand jury, if the proof for the prosecution discloses that the weapon was known to have been a hammer, a variance results (*Johnson* v. *State*, 4 Ala. App. 62, 58 So. 754). In cases involving the allegation that a certain fact is unknown to the grand jury, the rule in Texas is that the prosecution must adduce proof to support this allegation as well as other allegations (*Martin* v. *State*, 80 Tex. Cr. R. 275, 189 S. W. 262).

2. In the courts of the United States, however, the averment that a thing was unknown to the grand jury is presumed to be true until the contrary appears (*Coffin* v. *U. S.*, 156 U. S. 432, 451). The prosecution therefore starts with the presumption in its favor.

3. The result of this presumption is to shift the burden of proof onto the defendant.

The statement that a thing is presumed is merely another way of saying that the burden of coming forward with the proof has been shifted to the opposite party (4 Wigmore on Evidence, §2490; *Holt* v. *U. S.*, 218 U. S. 245, 253).

B. The offer of proof was complete and satisfied all legal requirements.

1. The inquiry is as to the actual knowledge of the grand jury of a specific fact.

We are frank to admit that the inquiry is as to the actual knowledge of the grand jury, and what the grand jury ought to have known, or what it could by investiga-

tion have found out, is absolutely immaterial (*Com.* v. *Glover,* 111 Mass. 394, 401; *Enson* v. *State,* 58 Fla. 37, 40, 50 So. 948, 949).

2. The defendants offered to prove the actual knowledge of the grand jury by the witness who testified, and by a member of the grand jury who heard.

We take it that there can be no question but what a grand juror was a competent witness (12 R. C. L. 1039; *Atwell* v. *U. S.* (C. C. A.) 162 Fed. 97; *State* v. *Benner,* 64 Me. 267; *Com.* v. *Hill,* 11 Cush. 137; *Com.* v. *Mead,* 12 Gray 167; *Com.* v. *Green,* 126 Pa. St. 531, 17 Atl. 878).

In its opinion, the learned trial court said (Rec. 35), speaking of Joy:

> "That his testimony before the grand jury was the same as upon this trial may also be admitted; but it by no means follows that the grand jury believed he was in the conspiracy charged in the indictment."

Also, during the argument, it was suggested by the learned trial court that a distinction might be made between the *Riley* case and the instant case, in that whether or not certain men had paid certain money or made contributions was, in the *Riley* case, a fact, while in the instant case, whether or not a man was a conspirator was a conclusion from other facts, and while the grand jury might know that Joy had bought whiskey from Heitler, Perlman and Greenberg before October 1st, had gone out and procured a purchaser in order to obtain the remaining thirty-two cases, had gone to Gresham Station and received his whiskey, nevertheless, notwithstanding such knowledge, the grand jury might not know that Joy was a conspirator. Of course, the mere fact that an individual is mentioned in testimony before the grand jury is not evidence that, from such testimony, any particular conclusion was drawn (*Cooke* v. *People,* 231 Ill. 9), and if the offer of proof had merely been to the effect that

Joy had recited certain facts to the grand jury, the offer would have been defective. This is the very reason why a grand juror was included, as a witness, within the terms of the offer.

We first call attention to the fact that, in the *Riley* case, whether or not men had made contributions was not the fact in issue. The fact in issue was whether or not the grand jury *knew* that such contributions had been made. In order to establish as a matter of absolute proof the deductions and conclusions drawn by the human mind from oral testimony, it is necessary to produce not only the witness who gave the testimony but also the possessor of the said mind, that the latter may be asked what he concludes from such testimony, which is exactly what the defendants offered to do. The distinction between the *Riley* case and the instant case, is, it is submitted, merely one of degree and not of kind. In the *Riley* case, the question was merely whether or not the grand jury knew a certain fact from the evidence before it. In the instant case, the first question is, did the grand jury, from the evidence before it, know the connection of Joy with the conspiracy? So far there is an exact parallel with the *Riley* case. The next question is, did the grand jury know that the said connection was that of a conspirator? We do not believe that it can be successfully maintained that the grand jury did not know that Joy was a co-conspirator from the facts before it, which must be taken to be the evidence elicited from Joy on direct examination, since this is the only conclusion which can be drawn from such facts. We are strengthened in this belief by the fact that another individual, the co-defendant Ambrosi, was indicted as a co-conspirator and his connection with the conspiracy, if the government's testimony is to be believed, was that of a purchaser, the distinction between Ambrosi and Joy being that Ambrosi did not go out and resell any of the liquor while Joy did.

The defense, therefore, made a complete offer when it tendered not only the witness who spoke but also the grand juror who heard and understood.

C. The variance was, therefore, fatal since the crime of conspiracy is not, nor should it be, an exception to the general rule.

Since the existence of the general rule, that a variance is fatal, must be admitted, there seems to be no good reason why this defense should be done away with in this particular crime, which has been termed "a drag-net of vague charges" (*State* v. *Van Pelt*, 136 N. C. 633, 641), a description particularly apt, as an analysis of the elements of this crime will disclose.

Since the time proved may be any within the statute of limitations, the place, Chicago, is rather large, and the word "conspired" is devoid of all facts to distinguish one mental act from another, a defendant would not learn much from these allegations. The allegations setting forth the overt acts may or may not inform a defendant of his own supposed acts, depending upon whether or not he is named therein. Only in the allegations setting forth the objects of the conspiracy and the names of the co-conspirators can a defendant find information essential to his defense.

In the case of *Commonwealth* v. *Hunt*, 4 Metc. 111, Mr. Chief Justice Shaw, in discussing a relaxation of the rules of law as applied to conspiracy, used the following language (page 125):

> "From this view of the law respecting conspiracy, we think it an offense which especially demands the application of that wise and humane rule of the common law, that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged."

A defendant charged with the crime cannot, of course, no matter how innocent he may be, merely come into court and deny that he had anything to do with the conspiracy, relying upon his innocence to protect him from the perjury or honest mistakes of the government witnesses. The defendant must prepare his case in order that he may show the court and jury, if such be the fact, that he was engaged in business in some other place at the time he was supposed to have met with his co-conspirators, or he may show the records, if any, of the government witnesses, or, as in the instant case, the evidence may show that the government witnesses, and not the defendants, were guilty of the crime. To deny a defendant the privilege of ascertaining the approvers who will appear against him is to make a mockery of the right to be confronted with witnesses and to whittle away confrontation until it becomes a mere facial encounter. How is a defendant to investigate the character of an opposing witness, to investigate the facts to which he may testify—how is he, in short, to fully prepare his case for trial, if he is not even informed of the name of the witness, let alone his connection with the charge in question? It appears (Rec. 35) that the learned trial court was of the opinion that the defendants had been fully apprised before trial of the story to be told by Joy. It is respectfully submitted that this fact is immaterial. The intent of Amendment VI is that the defendants shall be informed of the charge by the allegations of the indictment—nothing is said about their having to hire private investigators. We frankly admit that these defendants knew the ultimate facts in Joy's story, but the rules of law whereby guilt or innocence is ascertained operate alike upon all. We cannot have one rule of law for those who have been enabled by their own investigations to ascertain the charges against them and another

and entirely different rule of law for other defendants who have been less fortunate in investigating. The argument as to the knowledge of the defendants comes, we further submit, merely to this: that if the defendants had not prepared for trial, they could have claimed a variance, but having prepared for trial and having ascertained the true state of the alleged facts to be urged against them, they have thereby waived the point of variance. If such be the fact with respect to one of the six essential allegations of a conspiracy count, would it also be the fact, may we inquire, of two, three, four, five or all?

D. The cases cited in the opinion of the learned trial court, and the reasoning appearing therein, do not support its ruling.

1. The indictment in this case does not inform the defendants of the charges against them in such a way as to satisfy the constitutional requirement.

The learned trial court in its opinion (Rec. 32 ff.) has recourse to Amendment VI to determine whether or not the defendants have been informed of the charge, the thought being that if they have been informed of the charge against them, no point of variance can be made. Before proceeding further, we wish to make a distinction between an indictment which fails to set forth all the elements of a charge and an indictment which does set forth all such elements. The first will be insufficient because it fails to comply with the requirements of the amendment. Because the second does so comply, does not mean that a judgment of conviction thereunder will not be erroneous if a variance exists. The two points are entirely separate and distinct.

The learned trial court closed that part of its opinion

dealing with the point on variance with this statement (Rec. 36):

> "If the purpose of an indictment be to apprise the defendants of the nature and character of the charge so that each defendant, be he innocent or guilty, may prepare adequately for trial, then the failure of the grand jury to name Joy or any other person was not fatal in this case."

We respectfully submit that the learned trial court has confused knowledge gained from the indictment and knowledge gained by private investigation aside from the indictment. The constitutional requirement is that the *indictment* should inform the defendants. A most casual reading of this indictment will disclose the fact that nowhere therein is mention made of any of the government witnesses. The indictment therefore does not disclose to the defendants this particular element of the charge.

The learned trial court further notes that this indictment sets forth with great particularity the transaction in whiskey. This may be true of the defendants Heitler, Perlman and Greenberg. Examining the indictment (Rec. 2-4), we find, however, that the defendants McCann and Quinn are mentioned therein but twice, *i. e.*, that they conspired with certain individuals and that they, with all the rest of the defendants, unloaded the car at Gresham Station (Overt Act No. 5). As we have before noted, the assertion that they conspired conveys no information; and the statement that they unloaded the car was entirely unsupported by proof, there being not one word in this record to show that either of these two defendants was at that or any other time within one hundred miles of that car. If the learned trial court's reasoning is to be followed, we must, we submit, have one rule which is to be applied to Heitler, Perlman and Greenberg and another rule which is to be applied to Quinn and McCann.

2. *People* v. *Mather,* 4 Wend. 229, was wrongly decided in principle.

This case was much relied upon by the government in argument on the motions for a new trial, and as a consideration thereof is inevitable, we have taken this opportunity of discussing it.

This was the famous Masonic conspiracy case arising out of the disappearance of one Morgan. The indictment charged that "the defendant, with divers persons unknown to the jury, did conspire, * * *." The defendant was acquitted by the trial jury and the state moved for a new trial. The defendant submitted certain propositions to the court to show that a new trial should not be granted, because, in any event the defendant could not be convicted under the indictment. Among the points so submitted was the point that the indictment charged a conspiracy with persons unknown, whereas the persons so charged to have been unknown were in fact known. The trial court denied the motion for a new trial and this ruling was sustained on appeal. The real point in the case was that the state was not entitled to a new trial after a verdict of acquittal. The Court, in discussing the point now in question, said at page 266:

> "* * * if a person is charged with a larceny, the indictment ought to show who was the owner of the goods stolen, that the accused may know for what act he has to answer. But in a charge of conspiracy it seems no more necessary to specify the names of the defendant's coadjutors than in an indictment for an assault and battery to name others besides the accused who were concerned in the trespass, if the fact were really so. In Kinnersley and Moore a case is mentioned where this point was directly passed on. The bill presented to the grand jury charged that Herne with A and *cum multis aliis* conspired to accuse B of a felony. The grand jury returned the bill with an ignoramus as to A. Then the charge against Herne as presented by the indictors was, that he

with many others conspired, etc. The indictment was objected to as insufficient on motion to arrest the judgment; but the court denied the motion, and said that the indictment was sufficient, it being found that Herne with many others did conspire, etc., and it might have been so laid at first."

We respectfully submit that the learned Court was very much confused in theory, as is disclosed by its citation of the *Kinnersley* case (1 Str. 193), which is sufficiently set forth in the above excerpt to show that it is not in point. If A has committed the crime of larceny that crime is complete in itself and is neither increased nor decreased, nor affected in any way, by the fact that B was present and took part therein. The fact that B hit X with a hammer is in no way descriptive of the fact that A hit X with a club. It is far different with conspiracy, for the second individual is an essential element; without him there can be no such crime. The learned trial court in its opinion said (Rec. 32):

"The two decisions *Jones* v. *United States,* 179 Fed. 584, and *People* v. *Smith,* 239 Ill. 91, respectively, admittedly support the Court's ruling * * *."

We beg leave to state with great respect that the learned trial court is in error. In the *Jones* case, the defendants were accused of conspiring among themselves, and with divers other persons to the grand jury unknown, to defraud the United States. It was contended that one Ormsby, not a defendant, was a co-conspirator, and was known to the grand jury to have been such, the said Ormsby having appeared as a witness before the grand jury. The Court of Appeals calls attention to the fact that the indictment, in the allegations with reference to two of the overt acts, fully set forth the connection of Ormsby with the conspiracy, saying, at page 596:

"The name of Ormsby and his connection with the case was known to the grand jury and he and his acts were properly described in the indictment."

It is true that the learned Court of Appeals states its belief that the correct rule was that declared in the *Mather* case, but nevertheless, it preferred to place its decision on the ground that there was no variance between the proof and the allegations of the indictment.

In the *Smith* case, the record does not disclose that the grand jury in fact knew that one Howe was a co-conspirator nor does it disclose anything more than that the grand jury might have had such knowledge. With the exception of the *Mather* case, the cases cited in the *Smith* case as authority for the Court's ruling have but little, and some of them have nothing, to do with the point under consideration. The *Graff* and *Cohen* cases in particular are valuable merely for their citation of the *Mather* case, but on an entirely different point.

It is submitted that the weight of authority on the question now under consideration consists solely and entirely of *People* v. *Mather*. It would not seem that the point was discussed in that case with sufficient discrimination to warrant the assumption that, notwithstanding the point was not involved in the decision, the case may nevertheless be considered as a leading one.

It is respectfully submitted, therefore, that the allegations with respect to unknown conspirators must be treated, as to variance, in exactly the same manner as an allegation with respect to unknown articles which have been the subject of larceny, unless there is some proper foundation in theory upon which it may be distinguished, and the burden in this respect should be upon those who seek to distinguish, not upon the defendants who seek to apply a general rule which has been and is universally acknowledged, to wit: A variance results where that which is charged to have been unknown to the grand jury was in fact known.

VIII.

The court erred in giving the instruction which purported to describe to the jury the charge in the indictment, in that the offense so described was not the offense with which the defendants were charged.

The learned trial court charged the jury informally (Rec. 292, 294) and practically told them that the conspiracy was one to bring the liquor to Chicago unlawfully and to distribute it to persons not entitled to receive it.

We fully appreciate the fact that the learned trial court so charged the jury because, as stated in its opinion (Rec. 39),

> "* * * each and every one of the attorneys, both in argument to the court, and in argument before the jury, stated that there was no question of the existence of the conspiracy * * *."

If the case had been tried on the proper theory, and if the defendants had been permitted to place the only fact in issue squarely before the jury, this point would not have been raised. We have seen, however, that they were not permitted so to do and the court was informed by the motions for a directed verdict, points 8 and 10 thereof (Rec. 11, 13, 14, 16), that the defendants would insist upon taking advantage of this specific defense, since none other had been left them.

A. The charge was, from the standpoint of this defense, erroneous in the following particulars:

(1) The instruction first charged the jury that the possession, transportation and sale were illegal unless for medicinal or sacramental uses. The learned trial court had evidently come to the conclusion that the National

Prohibition Act prohibits such transactions in intoxicating liquor except for medicinal and sacramental uses. We are in entire accord with the learned trial court in its interpretation of this Act. In the event, however, that this Court should hold that the Act is constitutional on the ground that it does not prohibit the purchase, sale, transportation and possession of intoxicating liquor for other non-beverage purposes, to wit: for culinary, manufacturing and mechanical purposes, the point would be made that the charge, as given, authorized the conviction of the defendants even though the jury might find that the purpose was permitted by the statute. In any event, if the jury found that the purpose was culinary or mechanical, they were authorized to convict under this charge.

(2) The learned trial court erred in charging the jury that the conspiracy was one pursuant to which intoxicating liquor was to be shipped to Chicago and there distributed to persons who were not under the law entitled to receive the same.

B. The instruction was erroneous in that it omitted and misdescribed a necessary element of the crime, to-wit: beverage purposes.

1. A charge is erroneous which omits or misdescribes an element of the crime.

We take it to be elementary that a defendant cannot be convicted of any crime except that charged in the indictment, no matter how conclusive the evidence may be as to the commission by the defendant of some other crime. There is a clear distinction between the various crimes denounced by the National Prohibition Act. A casual reading of that act discloses, for instance, the crime of selling for beverage purposes, of selling for medicinal purposes without a permit, of selling for medic-

inal purposes without receiving a prescription from the buyer, etc.

In *State* v. *White*, 31 Kan. 342, 2 Pac. 598, the information charged that the defendant sold intoxicating liquor for other than medicinal, scientific or mechanical purposes contrary to the statute. The evidence showed that the defendant had sold intoxicating liquors for medical purposes upon affidavits authorizing sales for mechanical purposes. The trial court instructed the jury, in short, that such sales would authorize a conviction. In reversing the judgment because of the error in the instruction, the Court said, at page 345 of the official report:

> "Of course the defendant was guilty of an offense, under § 9 of the prohibitory liquor law of 1881, for selling intoxicating liquors in this manner; but the present prosecution is not a prosecution for any such offense. The present prosecution, as before stated, is for selling intoxicating liquors for other than medical, scientific or mechanical purposes, and is not a prosecution for merely selling such liquors for proper purposes in an irregular manner."

2. The conspiracy charged in the instruction was not the same as that charged in the indictment.

The learned trial court peremptorily instructed the jury (Rec. 293) that the shipment of liquor, its sale and possession in Chicago, was illegal unless such possession or sale was for medicinal purposes or sacramental uses. The court then stated to the jury the question in the case, towit:

> "Was there a conspiracy to thus violate the National Prohibition law?"

The indictment charged the defendants with conspiring to commit the offenses of purchasing without a permit, transporting without a permit and not for non-

beverage purposes, selling for beverage purposes and possessing for sale for beverage purposes. The instruction of the court amounted to this: That if the purpose was not medicinal or sacramental, it was therefore beverage. In view of the many other non-beverage purposes to which liquor may be put, we respectfully submit that the foregoing is a *non sequitur*. Under the indictment it was necessary for the government to prove the beverage purpose as part of the charge. If the proof had shown, and if the defendants had admitted, the transportation, sale and possession for culinary purposes without a permit, we take it that the evidence would not have proven the charge. The instruction of the court relieved the government from proving that the transportation, etc., of the liquor was for beverage purposes as distinguished from any other purpose.

The learned trial court further instructed the jury (Rec. 294) that the claim of the government was that a conspiracy was formed to violate the Act by causing a carload of whiskey to be secured, to be shipped to Chicago, and to be unloaded and distributed to persons who were not under the law entitled to receive the same. The point is made that, under that presentation of the charge against the defendants, the government was relieved of the necessity of proving that one of the objects of the conspiracy was the sale in Chicago, because the word "distribution" has a more extensive meaning than "sale" and includes every transaction whereby liquor could be manually transferred from one person to another. The charge also shifted the test of guilt, which was no longer to be the intent or purpose of the defendants, but was to be the fact that the recipients of the liquor in Chicago were not authorized by law to receive it. We do not deem it necessary to make further comment upon the fact that the jury, under these instructions, was

authorized to convict the defendants of a crime other than the one charged in the indictment.

3. The error in the instruction was not, nor could it be, cured by another correct instruction.

The learned trial court failed to give, anywhere in its instructions, a proper description of the charge against the defendants as the same was contained in the indictment. An erroneous instruction is presumed to result in error (*Mills* v. *U. S.*, 164 U. S. 644, 649; *Commonwealth* v. *Ross*, 266 Pa. 580, 583, 110 Atl. 327, 328). The point cannot be here raised that the erroneous instruction was cured by another and correct instruction, for no such instruction was given.

We therefore respectfully submit that the defendants have been prejudiced by the giving of the improper instructions complained of.

In conclusion, on this point, we therefore respectfully submit that, because of an erroneous theory, which was fundamental, the learned trial court fell into grave error

(1) In declining to admit evidence to prove the extensive liquor traffic carried on by the approvers;

(2) In declining to admit evidence to show that Joy had sought to influence a witness;

(3) In giving the instruction on accomplices complained of;

(4) In failing to recognize that approvers, as witnesses, are in a class by themselves and in failing to give requested instruction "C";

(5) In refusing to permit the defense to prove a variance;

(6) In misdescribing the charge in the indictment; and

(7) In declining to charge the jury on the theory of the defense, to charge on the evidence which was in the record, that the approvers could be considered to the extent to determining whether they or the defendants had committed the crime.

Point IV.

The evidence does not prove the commission of any one of the overt acts charged in the indictment.

The overt acts charged in the indictment (Rec. 3-4), insofar as we are now concerned therewith, were as follows, to wit:

> 1. Said Michael Heitler, Nathaniel Perlman and Mandel Greenberg, on to wit, September 25, 1920, at Chicago aforesaid, collected a large sum of money, to wit, $135,000.00 from said James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block, and Max Wagman.
>
> 5. Said Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Edward Smale, George Hans, Eugene McGaffrey, Morris H. Gindich, William A. Gorman, Timothy Judge, Joseph P. Galvin, Frank O'Hara, Henry P. Wissing, George F. Quinn, William J. Trudel, Frank McCann, James O'Leary, Thomas McLaughlin, Nicholas Ambrosi, Bryan Kane, Patrick Simmons, John H. McGovern, William E. McGovern, George F. Callaghan, Edward P. Graham, Samuel Block, Samuel J. Cohn, Joseph Marner, Harry R. Block, and Max Wagman, on October 1, 1920, at said Gresham Station, in Chicago aforesaid, unloaded said distilled spirits and intoxicating liquor from said Rock Island Car. No. 155,364.

The point here made was presented to the trial court by

1. Motions to direct a verdict at the close of the evidence for the United States (Rec. 160):

2. Motions to direct a verdict at the close of all the evidence in the case (Rec. 282-7); and

3. Defendants' requested instruction "B" (Rec. 306), which instructed, in short, that the jury could not convict unless they found that one of the overt acts charged in the indictment, describing them, had been committed as therein charged.

The learned trial court gave instruction "B", but with reference to overt act No. 5, qualified the instruction as follows (Rec. 306):

> "I want to say with reference to that last that it does not have to be shown that they personally picked up the cases and carried them out. They could have participated in unloading the freight car without personally having carried out the goods."

The errors complained of are the refusal of the learned trial court to direct a verdict as requested and the qualification by the learned trial court of defendants' requested instruction "B."

I.

The overt act is an element of the crime and, as such, at least one of the overt acts charged in the indictment must be proved as alleged.

The statute under which this prosecution was had (Sec. 37 of the Criminal Code), insofar as it here applies, is as follows:

> "If two or more persons conspire to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined," etc.

The elements of the crime of conspiracy, aside from time and place, are:

(1) Two or more persons;

(2) An agreement between them;

(3) The commission of a federal offense as the object or purpose of the agreement; and

(4) An overt act.

The overt act must be committed by a conspirator. Consequently, the dismissal from the case of the co-defendants Morris H. Gindich, O. H. Wathen and W. F. Knebelcamp removed from the case overt acts Nos. 2 and 3 and the learned court so instructed the jury (Rec. 306). For the same reason, the verdict of acquittal as to the defendant William Gorman (Rec. 308) removed from the case overt act No. 4. Overt acts Nos. 1 and 5, therefore, remain for consideration.

We appreciate the fact that the early view was that the overt act was merely evidence of the crime (*U. S.* v. *Britton,* 108 U. S. 199, 205), but this view paid too great attention to the common law and too little to the change made by the statute (*Hyde* v. *U. S.,* 225 U. S. 347, 359). The present view is that the overt act is a necessary element of the crime and without it there is no crime under this statute (*U. S.* v. *Rabinowich,* 238 U. S. 78, 86; *Ryan* v. *U. S.* (C. C. A.) 216 Fed. 13, 32; *Gruher* v. *U. S.* (C. C. A.) 255 Fed. 474, 476). As is the case with elements of every crime, the overt act must be charged in the indictment (*Pettibone* v. *U. S.,* 148 U. S. 197, 202; *Thomas* v. *U. S.* (C. C. A.) 156 Fed. 897, 906) and having been alleged, must be proved as alleged (*U. S.* v. *Hamilton,* Fed. Cas. 15288; *U. S.* v. *Ault,* 263 Fed. 800, 803).

II.

The overt act must be an act to effect the object of the conspiracy and cannot be the object itself. Under this head, consideration will be given to overt act number one.

The element now under consideration is defined in the statute as

(1) An act

(2) performed by a conspirator

(3) to effect

(4) the object of the conspiracy.

The overt act, insofar as we are concerned therewith, must be something which, when done, would tend to accomplish the object of the conspiracy (*Dealy* v. *U. S.*, 152 U. S. 539, 546) or must be directed toward the attainment thereof (*Lonabaugh* v. *U. S.* (C. C. A.) 179 Fed. 476, 479). It is not sufficient if the act merely follows the conspiracy in point of time (*U. S.* v. *Dowling*, 278 Fed. 630, 639). The allegations of the indictment, set forth in overt act No. 1, charged that Michael Heitler, Nathaniel Perlman and Mandel Greenberg collected $135,000 from fourteen named individuals, but the proof dwindled down to an attempt to prove the collection of $2,780 from but one, Nicholas Ambrosi.

For the convenience of the Court, we here summarize the evidence relative to this alleged collection:

A. Testimony of Joy:

(1) On October 1st, at 2:30 P. M. (Rec. 127), Ambrosi gave Joy and Miller $2,780 which they turned over to Heitler, Perlman and Greenberg in Ambrosi's presence. Joy gave Ambrosi a receipt (Rec. 124).

(2) Ambrosi gave the money to Miller and Miller gave it to Perlman (Rec. 138, 124).

(3) Ambrosi gave the money to Joy (Rec. 127).

(4) Joy gave Ambrosi's money to Miller and Miller gave Ambrosi a receipt (Rec. 137).

(5) Miller paid the money back to Ambrosi (Rec. 137).

(6) Miller paid back twenty-five per cent of the money and Heitler, seventy-five per cent (Rec. 138).

B. Testimony of Miller:

(1) Joy and Miller gave Ambrosi a receipt, which stated that he would get his money back if he did not get the liquor (Rec. 144).

(2) Miller did give Ambrosi back his money (Rec. 146).

(3) Miller did not give Ambrosi back his money (Rec. 150).

(4) Ambrosi did not give Miller any money, but gave it to Perlman in the presence of Joy and Miller (Rec. 150).

(5) Ambrosi was to get the whiskey from Joy and Miller (Rec. 150).

Omitting all reference to the testimony offered by the defense, which was that Ambrosi did not pay any money to anyone for whiskey, and confining our consideration to the evidence offered by the government, on that testimony, is it possible to surmise what really happened? Not only do the two witnesses fail to agree with each other, but neither one agrees with himself. From that testimony, either Ambrosi paid money to Joy and Miller, or he paid it to Perlman, or he did not pay any money

to anyone. The verdict of acquittal as to Ambrosi (Rec. 17) shows that the jury believed the last of these hypotheses. In fact, the only part of the testimony of these two witnesses which is not replete with self-contradiction is that Ambrosi was to get the whiskey from Joy and Miller and they, in fact, gave him a receipt for it. If such be the case, the overt act has failed of proof, because a collection from Joy and Miller is not a collection from Nicholas Ambrosi. Assuming, however, that Perlman did collect the money from Ambrosi, the testimony shows that the supposed collection was at 2:30 P. M. on Friday, October 1st. The act, then, could not be in effectuation of the purchase, which was one of the objects of the conspiracy, because that had been made several days before (Rec. 92); it could not be in effectuation of the transportation to Chicago, because the transportation was then almost at an end (Rec. 97) and the collection of money was entirely independent thereof; nor could it be in effectuation of the possession for sale in Chicago, for the reason that it was in itself a sale, which not only could not effectuate an antecedent possession for sale, but, in fact, made such a possession impossible. Can it then be an act to effect the sale in Chicago, or, in other words, can the object of the conspiracy be charged as an overt act? This Court has many times said that the overt act need not be the object of the conspiracy. We would go even further and say that in no event can it be.

The dictionaries give the meaning of "effect" as, to bring about, to produce as a result, to be the cause or producer of, etc. (*U. S.* v. *Ault,* 263 Fed. 800, 804). "Effect," then, connotes not only an object which is to be accomplished or achieved, but also something which is to do the accomplishing or achieving. This "something" is the overt act. In and of its very nature, the active or effecting part must be antecedent in time to the object

or thing effected and under no approved or existing meaning of the word "effect" can the object be also the active, effecting agent, or, in other words, can a thing effect itself.

We have been unable to find any case which is directly in point (but see *Hyde* v. *U. S.*, 225 U. S. 347, 259; *Lonabaugh* v. *U. S.* (C. C. A.) 179 Fed. 476, 479), although an indictment is defective if it appears that the overt act charged could not possibly effect the object (*U. S.* v. *Biggs*, 157 Fed. 264, 273; *U. S.* v. *Ault*, 263 Fed. 800, 803; *Tillinghast* v. *Richards*, 225 Fed. 226, 229). We are fortified in our position, however, by the fact that Congress has seen fit to add an element to the common law definition of conspiracy, which was "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose * * *" (*Com.* v. *Hunt*, 4 Metc. 111, 123). When the overt act was added, without which there is no crime, the irresistible conclusion is that Congress intended this to be an additional element and not merely the object under a new name.

III.

The evidence does not prove the commission of overt act number five as alleged.

The overt act, insofar as we are concerned therewith, alleged that, at a certain time and place, Michael Heitler, Nathaniel Perlman, Mandel Greenberg, Frank McCann, George Quinn and twenty-four named co-defendants "unloaded said distilled spirits and intoxicating liquor from said Rock Island Car No. 155,364."

The point here made is that the evidence does not prove that the said defendants, or any or either of them, "unloaded" said liquor from said car. Since no attempt was

made to prove that any defendants except Heitler, Perlman and Greenberg were even at the car, the evidence in regard to these three is all that is relevant.

A. The evidence adduced by the government relative to unloading before the holdups is as follows:

(1) Koeller and Fisher, unprejudiced witnesses, failed to identify either Heitler, Perlman or Greenberg as even having been at the car (Rec. 100, 142).

(2) Harry Frank saw Perlman, Heitler and Greenberg at the car. Perlman said "go and get your stuff there" and gave Frank the liquor (Rec. 114). Neither Heitler nor Perlman were helping to load; Greenberg was checking the goods (Rec. 118). Greengaard, who was right with Frank, saw Heitler, Perlman and Greenberg standing in the street near the car, five or six feet from it. They were not doing anything and he did not hear Greenberg say anything, nor did he see anyone on the ground checking (Rec. 121).

(3) Joy saw Heitler, Perlman and Greenberg at the car. Heitler went off with Sergeant Judge and when he returned, told Joy to "go ahead and load" (Rec. 124).

The most that can be said of the above testimony is that it shows that Heitler, Perlman and Greenberg were at the car. The testimony is positive as to the fact that neither Heitler nor Perlman were helping to load. There is testimony, though contradicted by Koeller, that Greenberg was on the ground checking.

B. The testimony as to the unloading after the holdups is as follows:

(1) Greengaard saw Heitler, Perlman and Greenberg at the car (Rec. 121).

(2) Frank, who was with Greengaard, saw Heitler

and Perlman at the car; no trucks were at the car (Rec. 118).

(3) When Joy returned to the car, Heitler "was unloading the last load on a machine" (Rec. 125) and said that he was busy loading up the truck (Rec. 135).

(4) Miller, who was with Joy, saw Heitler, Perlman and Greenberg at the car and Heitler "was loading up the last truck" (Rec. 145). Heitler was standing out in the street alongside of the truck, which was already loaded when Joy and Miller arrived (Rec. 146).

The above testimony shows that Heitler, Perlman and Greenberg were at the car and contains a few general statements about unloading. On cross-examination, however, the general expression "unloading" was so qaulified as to limit its meaning to mere presence beside a truck which someone had already loaded. It may be of interest to note that Koeller failed to mention on direct examination (Rec. 97-9) the above occurrences as detailed by the approvers. The defendants each denied that they were even at the car that night, and in this they were supported by the government witnesses Koeller and Fisher and by their own witnesses Wissing (Rec. 221), O'Hara (Rec. 223), Lynch (Rec. 227), Cohen (Rec. 265), Stone (Rec. 186) and Rodkin (Rec. 206). No attempt was made to impeach these witnesses for the defense.

Assuming, however, as we must, that the above testimony of the approvers is true, that Heitler, Perlman and Greenberg, or either of them, were present, does mere presence constitute proof of unloading? Suppose we go further and assume that these three hired the men who did the actual unloading, which is not shown by the testimony. Does this added fact show an unloading?

In overt act No. 3, the allegation is that Wathen and Knebelcamp *caused* the liquor to be loaded onto the car

and the testimony was that their employees did the actual loading (Rec. 93-95). In overt act No. 5, the allegation is that Heitler and others *unloaded* the liquor, not that they *caused* it to be unloaded, or "participated in unloading the freight car," and the testimony, together with the assumption, shows merely that they *caused* it to be unloaded, their employees doing the actual unloading. One who hires an agent may be said to have caused the act done by the agent, but he cannot be said to have done it. We respectfully submit that no reason exists for not recognizing and applying the distinction in the case of this indictment, which, by its own allegations (overt acts Nos. 3 and 5) clearly shows that the distinction was known, understood and followed.

It is, therefore, respectfully submitted that, for the reasons above stated, the indictment has failed of proof.

Point V.

The remarks of counsel for the government during argument constitute reversible error.

At the close of all the evidence, Assistant District Attorney Kelly addressed the jury on behalf of the government, and in the course of his remarks said:

> "Now, we will take the case of Mandel Greenberg. We have shown by the testimony of Mossy Joy, and Miller, and Moore, that Mandel Greenberg was one of the Big Three in this conspiracy, notwithstanding the fact that Mandel Greenberg presented a framed alibi for the consideration of this jury (Rec. 287).
>
> If you have any tears, prepare to shed them now, Mike Heitler is ascending the witness stand. With measured tread and downcast eyes, Mike walks to the chair. You would think that Mike was going to the electric chair, he is so shocked. In answering questions of his counsel, he is meek and humble, 'Yes, sir, no sir.' Why, it is not the same man that threatened Morris Frank with death in the Englewood Station. It is not the same King of the Underworld, who, by the snap of his finger, holds the lives of men in his grasp (Rec. 288).
>
> Mike is true to his type, yellow, when he is cornered, resorting to any means to get out of a tight place.
>
> If all the tears that Mike caused were gathered in one reservoir, Mike Heitler could swim in it.
>
> Mike was playing a part when he sat in this witness chair. He is a great actor. He wanted to impress and show you how meek and humble he is.
>
> How much like Shylock Mike looked. He demanded his pound of flesh and he bled his victims (Rec. 289).
>
> The evidence shows here that Mossy Joy got back his diamonds, his stick pin and his ring, and he got them back after he made this demand on Heitler. Now, if Heitler had nothing to do with this, how could Heitler have gotten him back his diamond ring and his stick pin?" (Rec. 290).

Objection was duly made to all of the foregoing statements, and the rulings of the court thereon were as follows:

(1) To the statement that Mandel Greenberg presented a framed alibi, the ruling was that the argument was proper.

(2) To the allusion to Mr. Heitler as King of the Underworld, the ruling was that the statement was improper.

(3) To the statement that if all the tears that Mr. Heitler had caused were gathered in one reservoir, he could swim in it, the ruling was that the argument was proper. In the charge to the jury, the court did, however, say (Rec. 296):

> "Any reference by the prosecuting attorney to this man's (Heitler's) activity outside of this case was improper and I again admonish you to ignore it.
>
> During the argument of the parties, some reference was made and the statement made by one of the counsel as to tears having been shed. I do not believe I understood the counsel who made the statement at the time, I am not sure; but I want to now at this time again admonish you that anything outside of this record, outside of what was received on the trial is not proper."

(4) To the remark of counsel that Mr. Heitler resembled Shylock and demanded his pound of flesh and bled his victims, the court said that the argument was proper so far as it was a comment upon appearance, manner or anything disclosed by testimony, and continued (Rec. 289):

> "I wish to say, however, that if any of you think there is any reference to religion in the statement, that you will not decide this case upon race or religion. They are all in the same position. Race and religion, of course, have no bearing in this case any more than sympathy or prejudice."

During the argument of Mr. Symmes to the jury, the court further said (Rec. 290):

> "I now think that remark of Mr. Kelly's was improper, as to any reference to a Shylock, or the demanding of a pound of flesh. There is nothing that justifies it. * * * It is entirely unworthy to make remarks about any man's religion, or demanding any pound of flesh."

The court also charged the jury as follows (Rec. 301):

> "Be not swayed, then, by prejudice for or against anyone because of his race or his religion."

Mr. Kelly, immediately after making the statement, disclaimed any intention of bringing into the case anybody's race or religion.

(5) To the remark of counsel relative to Mr. Heitler's procuring the return of Mossy Joy's diamonds, the ruling was as follows (Rec. 290):

> "I think that the jury will have to pass on that question, too."

I.

The remarks of counsel were improper.

A. Remarks dealing in personalities.

Remarks and statements relative to physical appearance, race, religion, station in life or occupation, when such facts are not in issue in the case, are made with but one object in view, namely, to arouse in the minds of the jurors an emotion which will be favorable to one side or prejudicial to the other. For instance, in *Hall* v. *U. S.*, 150 U. S. 76, the district attorney, in his argument to the jury, said that the defendant had come to the Indian country from Mississippi with his hands stained with the blood of a negro, and that the killing of a negro in Mississppi, for which the defendant had been tried

and acquitted there, was murder. Another instance of such an argument occurs in *Lowdon* v. *U. S.* (C. C. A.) 149 Fed. 673, where the district attorney told the jury that if a juror decided that the defendants were not guilty, when he returned home, his neighbors might conclude that

> "the jingle of the broken bankers' unlawfully and illy-gotten gold in his pocket"

had influenced his action and decision. As was said by Circuit Judge Sanborn in *Union Pac. R. R. Co.* v. *Field* (C. C. A.) 137 Fed. at page 16:

> "It is exceedingly difficult to withdraw from the minds of jurors, or from any mind, suggestions of immaterial facts, insinuations of misleading rules of action, or arguments which arouse passion or prejudice; and yet in cases in which the address of counsel conveys suggestions of this nature to the minds of the triers of the facts it is only when it is certain that these have been withdrawn that the trial is fair and impartial."

A jury hearing an impassioned and vindicative argument, which characterizes a defendant as a King of the Underworld, a Shylock bleeding his victims, as the causer of many tears—a jury hearing such argument might struggle to free their minds from prejudice, but the mere fact that such statements and insinuations had been made must find lodgement in their minds and they cannot, no matter how conscientiously they may try, entirely free themselves from the effect of such statements (*Latham* v. *U. S.* (C. C. A.) 226 Fed. 420, 425).

The learned court in its opinion said (Rec. 39):

> "At the time the court was under the impression that an experienced counsel was endeavoring to embarrass the speaker who was inexperienced in presenting a case to the jury. Scarcely a thought was presented without interruptions and challenged."

We respectfully submit that argument of this kind should be interrupted and should be challenged.

It was truly said by District Judge Call in *Latham* v. *U. S.*, 226 Fed. at page 425:

> "The prosecuting officer is usually a person of considerable influence in the community, and the fact that he represents the government of the United States lends weight and importance to his utterances. He does not occupy the position of a defendant's counsel, but appears before the jury clothed in official raiment, discharging an official duty."

A remark, which might not be prejudicial when stated by counsel in a cause between individuals, may very well be highly prejudicial when stated in a cause wherein counsel makes the remark as a representative of, and on behalf of, the United States.

Before passing to a consideration of these remarks, we wish to correct the impression given by the learned trial court (Rec. 41) that the defendants were so satisfied with the impression left by the government prosecutor that they considered the advisability of waiving argument. We respectfully beg to state that the defendants, whatever might be said of co-defendants, at no time considered or thought of waiving argument.

There is absolutely nothing in the record on which to base the statement that Mr. Heitler was a

> "King of the Underworld, who by the snap of his finger holds the lives of men in his grasp."

The learned trial court, in its opinion, in speaking of this remark, said (Rec. 40):

> "There was testimony that he (Heitler) had run various places and that some at least had been closed up because of their bad repute."

We respectfully submit that there is not a word in this record to show that the police, or anyone else, had ever

closed any place run by Mr. Heitler because of its bad repute or for any other reason. The statement of counsel was not based on evidence in the case and was made solely for the purpose of prejudicing the jury against Mr. Heitler. It is safe to assume that it had the effect which Mr. Kelly intended and desired.

The remark that Mr. Heitler had caused so many tears that he could swim in them if they were gathered together in a reservoir was obviously an attempt to play upon the passions of the jury. A similar attempt was made in the case of *Ivey* v. *State,* 113 Ga. 1062. The defendant was indicted for the sale of liquor contrary to law and the district attorney, in his remarks to the jury, said:

> "Gentlemen of the jury, if you could go over this town and see the good mothers whose pillows have been wet with tears over their boys who have been intoxicated by the acts of this woman."

The remark was objected to, but the objection was overruled, and the judgment of conviction was reversed on appeal because of this error.

The remark that Mr. Heitler resembled Shylock, that he demanded his pound of flesh and bled his victims, was another remark whose only purpose could have been to arouse prejudice in the minds of the jury. The learned trial court, perhaps to justify this remark, said in its opinion (Rec. 40):

> "In the present case, witnesses testified that Heitler, Perlman and Greenberg bought a carload of whiskey for $32,000 and sold it to bootleggers for $135,000; requiring the purchasers to pay cash in advance; that they gave no receipts for moneys advanced and did not bind themselves to deliver any particular grade of whiskey, and this, all in violation of the law of the land."

With great respect, we beg to say that not a single witness connected Heitler, Perlman and Greenberg, or any

of them, with the purchasers of this carload of whiskey. Nor did a single witness testify that these defendants had sold it to bootleggers for $135,000. The record shows the price alleged to have been paid to them by Joy and by the Franks, but that is all. The testimony shows that no receipts were demanded and, with the exception of Joy's statement that Heitler would not tell him what particular kind of Louiville whiskey he would get, the record is silent as to the fact that these three defendants did not bind themselves to deliver any particular grade of whiskey. Assuming, however, that everything testified to by the approvers was true and that the above quoted statement of the court was supported by the evidence, can the fact that these defendants drove a hard bargain with the approvers furnish any excuse or justification for assuming that the approvers were victims and that, therefore, the argument was proper that Heitler had bled his victims?

B. Remarks purporting to deal with the evidence in the case.

The statement that the alibi presented by Mandel Greenberg was "framed" was improper for the reason that Mr. Kelly thereby decided a question of fact which should have been left to the jury. It would have been proper for Mr. Kelly to show that the facts set up in the alibi were not so, or to advance reasons for believing that the witnesses had testified falsely or mistakenly, but it was not proper for him to resolve the doubt and take the question from the jury. The truth of the matter was, Greenberg's alibi was perfect. His witnesses could not be shaken by cross-examination, nor could the government discover any interest which they had in the case (except the few who were related to Greenberg), nor could the government unearth any such attempts at subornation as Joy had been guilty of. The government,

of necessity, *had* to resolve the doubt and dismiss the question without argument. But the exigencies of a lawsuit furnish no excuse for such conduct on the part of the government prosecutor.

The question addressed to the jury by Mr. Kelly relative to the return of Mossy Joy's diamonds was a statement that Mr. Heitler had gotten Joy's diamonds back for him. There is not one word in this record to show that Mr. Heitler, or any of the other defendants, had anything whatsoever to do with, or were in any way responsible for, the return of those diamonds. All that is said about the return of the diamonds (Rec. 124-125) is that an unidentified fellow came to Joy's home and handed him a package wherein he found his diamond pin and ring.

II.

The remarks could not be, nor were they, cured by the instructions.

A. Remarks to which the court sustained objection.

We believe that this Court can appreciate, without extensive argument on our part, that this is a case in which it was easy to arouse prejudice. The three principal defendants were Jews and there is much in the record, from the mouth of Mossy Joy, accusing Heitler of having held up the trucks and stolen the whiskey. We respectfully submit that in this case, any instruction which the court might have given to the jury to disregard the statement that Mr. Heitler was a causer of tears, a King of the Underworld and a Shylock who demanded his pound of flesh and bled his victims, could not remove those statements from the minds of the jury.

B. Remarks to which objection was overruled.

The court overruled the objection to the remark of Mr. Kelly which, in effect, stated that Heitler had caused the return of Joy's diamonds and overruled the objection to the statement that Mandel Greenberg's alibi was "framed." Permission to make the comment upon Heitler's causing the return of the diamonds was equivalent to instructing the jury that they could take that fact into consideration (*Graves* v. *U. S.*, 150 U. S. 118, 121). As we have heretofore shown, there was no such fact in evidence.

To the reference that Mr. Heitler had caused so many tears to be shed that he could swim in them if they were gathered together in one place, the court first overruled the objection, and later, in the charge to the jury, made mention of the fact that a statement was made about tears having been shed and continued (Rec. 296):

> "I do not believe I understood the counsel who made the statement at the time, I am not sure; but I want to now at this time again admonish you that anything outside of this record, outside of what was received on the trial is not proper."

We respectfully submit that this general admonition, which did not even instruct the jury that the causing of tears was not in the record, was entirely insufficient to overcome the prejudice caused by the remarks of counsel, and was, in effect, no instruction on the point.

We therefore respectfully submit that the defendant Heitler, and the other defendants because of their association with him, was greatly prejudiced by the highly inflammatory remarks of counsel in argument to the jury and that the effect of these remarks could not be removed by any instruction which the court might have given.

Point VI.

There is no evidence in the record to prove the crime as charged, to wit: a conspiracy to commit all four crimes charged as having been the object thereof.

The learned trial court overruled the motions for a directed verdict (Rec. 160, 287) and overruled the motions for a new trial (Rec. 46) made by the respective defendants.

We will discuss all the evidence in the case as the government, after the close of its case in chief, did not introduce any evidence, so far as this point is concerned, to connect the defendants with the crime charged in the indictment.

I.

The government, having charged a conspiracy to commit four offenses, must prove that the conspiracy did, in fact, have as an object the commission of all four offenses.

A. The object of the conspiracy is an element of the crime and must be proved as alleged.

We do not believe it necessary to cite the Court to an imposing array of authorities to sustain the point that the object is an element of the crime (5 R. C. L. 1087; 12 C. J. 627). Being an element of the crime, it must be alleged in the indictment, and, having been alleged, it must be proved.

B. If the indictment charge a conspiracy to commit four offenses and the proof show a conspiracy to commit but one, two or three of said offenses, the proof has not sustained the allegations of the indictment.

1. To constitute a conspiracy, there must be a specific intent, which must be common to all conspirators and which must be alleged in the indictment.

The crime of conspiracy is principally mental, with the exception of the overt act, and the very word itself connotes an intent to effect the object (*Frohwerk* v. *U. S.*, 249 U. S. 204, 209). This intent must be a specific intent directed to the accomplishment of the object, whatever that object may be. Thus, in the instant case, we find the co-defendant Gorman was acquitted by the jury, although it was admitted by him that he identified Berkson to Koeller and thereby enabled Berkson to obtain possession of the carload of whiskey. The question was whether Gorman had the specific intent required to make him a guilty party or whether his intent was merely to assist Berkson, a casual acquaintance, to obtain identification. We also take it that if a detective had joined the band of conspirators for the purpose of discovering the guilty parties and frustrating them, he would not be a conspirator because of lack of intent, notwithstanding that he may have committed any one of the overt acts. This intent must also be common to all conspirators. It needs no citation of authority to sustain the point that an indictment would be bad on demurrer if it charged A and B with the offense of conspiring to commit fact "X," B and C with conspiring to commit fact "Y" and A and C with conspiring to commit fact "Z." It would be bad because it joined three offenses, but the reason it joined three offenses is because there were three different intents and no common intent. Assume now, that the indictment charged that A, B and C conspired to purchase liquor unlawfully; that A, B and D conspired to transport it unlawfully and A, B and E conspired to sell it unlawfully. We are unable to distinguish this assumed case from the preceeding one. There seem to be three

separate crimes charged as the respective objects of three separate conspiracies, there being no allegation connecting the three conspiracies in any way, and the fact that A and B happened to be parties to three conspiracies could not make one conspiracy out of three. Assume now, that the indictment charged that A, B, C and D conspired to unlawfully purchase, transport and sell intoxicating liquor. The indictment is good, but if the proof show the existence of three separate conspiracies, the situation is exactly the same as if the indictment had specified the three separate conspiracies, and the defendants could not be convicted.

2. If the proof show a different intent, whether as to the means employed or the object, the indictment has failed of proof.

Unquestionably, if an indictment charge a conspiracy to commit fact "X" it would not be supported by proof of a conspiracy to commit fact "Y," nor would a conspiracy to commit fact "X" by means "A" be proved by evidence of a conspiracy to commit fact "X" by means "B" (*Rabens* v. *U. S.* (C. C. A.) 146 Fed. 978; *Lawrence* v. *State,* 103 Md. 17, 63 Atl. 96; *People* v. *Brown,* 159 Ill. App. 396; *Lowell* v. *People,* 229 Ill. 227, 82 N. E. 226; *Commonwealth* v. *Harley,* 48 Mass. 506; *State* v. *Hadley,* 54 N. H. 224).

3. We come now to the proposition at issue, namely, does the proof fail if it shows, not that the object of the conspiracy proved was entirely different from the object charged, but, the object being charged as 1, 2, 3 and 4, that it was merely 1 or 2 or 3 or 4?

Our research has disclosed no authority in point either way.

In *Rex* v. *Pollman,* 2 Campb. 229, however, the indictment against the defendants charged that they

unlawfully and corruptly did meet, combine, con-

> spire, consult, consent and agree among themselves, and together with divers other evil disposed persons to the jurors unknown, unlawfully and corruptly to procure and obtain, receive, have, and take, to-wit, to the use of them the said F. P., J. K., and S. H., and of certain other persons to the jurors likewise unknown, a certain large sum of money, to-wit, the sum of £2,000 * * *.

The money was to be received in return for procuring an office for one Hesse. The proof showed that a co-defendant, one Watson, knew that the money was to be paid to Pollman and Keylock, upon Hesse's appointment, but there was no evidence to show that he knew that Sarah Harvey was to share in the money or that she had anything to do with the transaction. In directing a verdict of acquittal as to Watson, Lord Ellenborough said, at page 233:

> "The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think, that as to Watson, it is not. * * * You must prove that all the defendants were cognizant of the object of the conspiracy, and the mode stated in the indictment by which it was to be carried into effect. A contrary doctrine would be extremely dangerous."

The case of *O'Connell* v. *The Queen,* 11 Cl. & F. 155, was one of the most important cases, politically, ever decided by the House of Lords. It will be remembered that this was the case in which Lord Brougham, dissenting, with difficulty restrained the lay lords from overruling the decision of the law lords and from voting in favor of an affirmance. The argument was heard in the House of Lords before the Lord Chancellor, Lord Brougham, Lord Denman, Lord Cottenham and Lord Campbell. The judges were summoned and Mr. Chief Justice Tindal, Mr. Justice Patteson, Mr. Justice Williams, Mr. Justice Coleridge, Mr. Justice Coltman, Mr.

Justice Maule, Mr. Baron Parke, Mr. Baron Alderson and Mr. Baron Guerney accordingly attended.

The indictment had charged as follows:

Count 1. That the defendants did conspire with persons unknown:

A. To create discontent among the subjects of the Queen,

B. To excite such subjects to seditious opposition,

C. To stir up hatred between English and Irish,

D. To excite discontent in the English army,

E. To cause seditious assemblies, and

F. To bring the courts of law into disrepute.

Certain overt acts were alleged which are not here important.

Count 2. This count was the same as count 1, except that it omitted the allegations of the overt acts.

Count 3. This count was the same as Count 1 in substance, though charged in slightly different language.

Count 4. This count was the same as Count 3, except that it omitted objects D and F.

The remaining counts are not here material. The findings of the jury were as follows:

Counts 1 and 2:

A. All defendants were guilty of conspiracy to commit objects A, B and C.

B. One defendant was not guilty as to objects D, E and F.

C. Seven defendants were guilty as to objects D and E only.

D. Three of the seven defendants were also guilty of conspiring to commit object F.

The same general character of finding was also returned as to Counts 3 and 4.

The Lord Chancellor propounded certain questions which were submitted for the consideration of the judges, to-wit (page 231):

> "2. Is there any, and if any, what, defect in the findings of the jury upon the trial of the said indictment, or in the entering of such findings?"

Lord Chief Justice Tindal delivered the opinion of the judges in answer to the second question, holding that the verdict could not be supported because it was a finding of several conspiracies, saying, page 237:

> "And the reason and ground for such opinion is this: That as each count of the indictment charges one conspiracy or unlawful agreement, and no more than one, against all the defendants in such count, so the jury could find only one conspiracy or unlawful agreement on each separate count; for though it was competent to the jury to find one conspiracy on each count, and to have included in that finding all or any number of the defendants, yet it was not competent for them to find some of the defendants guilty of a conspiracy to effect one or more of the objects stated, and others of the defendants guilty of a conspiracy to effect others of the objects stated; because that is, in truth, finding several conspiracies, on a count which charges only one."

The opinion of the majority of the judges was accepted in answer to question No. 2.

We respectfully submit that this case decides that a conspiracy to commit part of the objects named is not the same conspiracy as one to commit all of the objects named.

In the *O'Connell* case, the true state of the jurors' minds appeared from the verdict. Assume, however, a case as follows:

A. The indictment: The indictment charges a conspiracy to commit four offenses, to-wit: offenses A, B, C and D.

B. Evidence: There is some, but conflicting, evidence that, as a result of an agreement, offenses A, B, C, and D were to be committed.

C. Instructions of the court: The court instructed the jury as follows: "You will find the defendants guilty if you find that they conspired to commit *any one* of offenses A, B, C, and D."

D. Opinions of the jury:

(1) Three jurors think the defendants conspired to commit offense A. Nine of the jurors dissent, but think they conspired to commit one of the offenses B, C, and D.

(2) The second three jurors think the defendants conspired to commit only offense B, the other nine dissenting.

(3) The third three jurors think the defendants conspired to commit offense C, the nine others dissenting.

(4) The fourth three jurors think the defendants conspired to commit offense D, the nine others dissenting.

E. Query: What is the verdict? If a vote be taken before discussion, the verdict must necessarily be one of guilty, in which case the defendant has been convicted by a jury of three men, not of twelve.

It is respectfully submitted that the court must charge the jury, either that the jury may convict if they find a conspiracy to commit any one of the offenses, or that, before convicting, they must find a conspiracy to commit all of the offenses. The general charge, that the jury

may convict only if they find the defendants guilty of the conspiracy charged in the indictment, leads right back to the question now at issue by virtue of the fact that, resulting from such general charge, is the question, what is the conspiracy charged in the indictment? If the charge be that the defendants can be convicted if they conspired to commit any one of the objects, how is the jury to determine, as in the *O'Connell* case, which particular set of defendants to convict and which to acquit?

In the *O'Connell* case, there was no rule of law requiring the jury to return a special verdict nor, in the assumed case, is there any rule of law requiring a jury to enter upon a discussion before taking a vote as to their verdict. It is respectfully submitted that if the defendants can be convicted of a conspiracy to commit part only of the objects charged in the indictment, either or both of the above results may result in any case wherein the defendants number more than two. It is further respectfully submitted that such should not be, and is not, the law.

II.

There is no evidence in the record to prove that any conspiracy existed to commit all four offenses.

In considering this point, we will entirely omit from consideration all evidence introduced on behalf of the defendants, since the question is, Is there any evidence?

The theory of the government obviously was that Heitler, Perlman and Greenberg conspired to cause the liquor to be purchased in Kentucky and transported to Chicago, to sell it in Chicago and to possess it for sale in Chicago. To prove the existence of a plan or scheme, it is not enough to show merely that isolated facts occurred at various intervals in point of time. The government must

produce evidence to connect the defendants with the plan as charged. This has not been done. There is no evidence which tends to make it any more reasonable to believe that the defendants were connected with such a plan or that such a plan existed than that Berkson conceived the original plan of purchasing and transporting and that he sold the liquor to the defendants in transit. There is not even any evidence in the record which connects the defendants with three out of four offenses, although there is some evidence, if the approvers be believed, that they conspired to sell.

A. There is no evidence in the record to prove that the defendants conspired to purchase intoxicating liquor from the old Grand Dad Distillery, etc., without first obtaining a permit.

There is no evidence in this record to show that McCann and Quinn even knew that the liquor had been purchased. The only evidence appearing in the record to connect Heitler, Perlman and Greenberg with the purchase of the whiskey is the various statements that some of them at various times are supposed to have said that they had whiskey coming. There is nothing in the record to show, however, that they had anything to do with the purchase of it from the Old Grand Dad Distillery Company. The record is entirely silent as to any connection between the defendants and Berkson, the purchaser, at or before the time of purchase.

B. There is no evidence in the record to prove that the defendants were parties to any conspiracy to transport the said intoxicating liquor from Hobbs, Kentucky, to Chicago, without obtaining a permit and for beverage purposes.

There is absolutely nothing in the record to show that Quinn and McCann even knew that the whiskey had been transported.

The only transportation shown by this record is a transportation by the mysterious Max Berkson, who is not connected in any way with the defendants.

C. There is no evidence in the record to prove that the defendants conspired to possess said liquor for sale in Chicago, for beverage purposes.

There is absolutely no evidence in this record to show that Quinn and McCann even desired to possess this liquor for sale in Chicago or anywhere else.

If the story of the approvers be taken at its face value as to Heitler, Perlman and Greenberg, which was that the whiskey had been disposed of by them before its arrival in Chicago, in view of the efforts of these three to sell the whiskey before its arrival in Chicago, as the same have been narrated by the approvers, the only reasonable deduction to be drawn from the testimony is, that if there was any one thing that these alleged conspirators did not agree to do or desire to do, it was to possess this liquor in Chicago.

Assuming, however, that evidence did exist to show possession as one of the objects, can it be said that the possession was a possession for sale? The record, in view of the assumption, would disclose a possession for delivery, perhaps, but not one for sale. This part of the case can only be made out by assuming that, since the defendants sold the liquor before its arrival, if they had not sold it, they would have taken possession of it on arrival, and if they had taken possession of it, they would have held it for sale and not gift, barter, exchange or personal use. This, we submit, is conjecture, not evidence.

Where the indictment charges that an act is done with a certain intent, the intent is that of the doer of the act. So in the case of a sale for beverage purposes, the in-

tent is that of the seller (*People* v. *Thompson,* 147 Mich. 444, 11 N. W. 96; *People* v. *Hinchman,* 75 Mich. 587; *King* v. *State,* 58 Miss. 737). In fact, the only time the intent of any other party becomes material is when it appears conclusively that the recipient in fact intended a lawful use (*Commonwealth* v. *Joslin,* 158 Mass. 482, 33 N. E. 653; *State* v. *Shinn,* 63 Kan. 638, 66 Pac. 650).

In *State* v. *Lesh,* 27 N. D. 165, 145 N. W. 829, the defendant was charged with unlawfully keeping intoxicating liquors for sale as a beverage. On appeal, the judgment of conviction was reversed on the ground that the court had in effect charged the jury that the defendant could be convicted of keeping intoxicating liquors for sale as a beverage if they found from the evidence that he sold them in violation of his permit, the Court saying, page 175:

> "* * * one charged with keeping liquor for sale as a beverage should or could hardly be found guilty of such a crime on the mere proof that he has neglected to comply with the conditions of the druggist's permit in making a sale, or has sold under such permit, or has kept intoxicating liquors to be sold thereunder, unless he has actually kept or sold such liquors as a beverage. Defendant, in short, was not charged with any technical violation of the terms of his permit, but with *keeping intoxicating liquors for sale as a beverage.*"*

It is true that the Prohibition Act (Section 33) raises a presumption from the possession of liquor by any person not legally permitted under Title II to possess liquor, but this presumption is merely that the liquor is

> "kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title."

In other words, the presumption is that the liquor is to be used in the commission of a crime, but not of any

*Italics the Court's.

particular crime. We do not understand that the government may accuse a defendant of a crime, offer proof that he has committed one out of five possible crimes, but not particularly the crime with which he is charged, and then throw upon him the burden of disclosing the particular crime which he actually committed (*People* v. *Stedeker*, 175 N. Y. 57, 68, 67 N. E. 132, 136). The burden of proving the crime is upon the government and this burden cannot be thrown upon a defendant by any such specious use of presumptions.

We respectfully submit, therefore, that the government has failed to show that the defendants, or any of them, were parties to any such conspiracy as is charged in the indictment.

In conclusion, we respectfully submit that the several judgments of conviction should be reversed and the causes remanded with directions to dismiss the indictment, for the reason that the plaintiffs in error can never be convicted under the indictment herein, based as it is upon an unconstitutional statute.

If, however, this Court shall hold that the statute here in question is constitutional, then we further respectfully submit that, because of the many errors apparent in the record, the several judgments of conviction should be reversed and the causes remanded with directions to grant a new trial to each of the plaintiffs in error.

Respectfully submitted,

Wynnewell Kirkland

Attorney for the Plaintiffs in Error.

Robert H. Golding

Of Counsel.

APPENDIX.

I.

The story as told on the witness stand by unprejudiced government witnesses and by witnesses for the defense.

The story of the case opens on September 24th, 1920, when two men, who might have been Jews, Italians or Greeks, appeared in the office of the Old Grand Dad Distillery Company in Louisville, Kentucky, and opened negotiations for the purchase of one thousand cases of whiskey. One of them introduced himself as Max Berkson, and, after three days spent in negotiation with Mr. Wathen, an officer of the distillery and a co-defendant, the purchase was consummated (Rec. 92), the two men exhibiting at that time a permit which it is conceded was fraudulent (Rec. 159). The two men then disappeared and no one knows where they came from, where they went, or who they were, but we do know that neither of them was Michael Heitler, Nathaniel Perlman or Mandel Greenberg (Rec. 96). The whiskey was then loaded on Rock Island car No. 155364, which was consigned to Peoria, Illinois (Rec. 93), where it was met by an individual who said he was Max Berkson, the consignee, who reconsigned the car to Gresham Station, Chicago (Rec. 96, 97), where it was later to be unloaded.

About this time, Maurice John ("Mossy") Joy and John Miller, both government witnesses, came to Nathaniel Perlman, at the latter's saloon in Chicago, and Joy said that they would have a carload of whiskey about the last of the month, which they wanted to sell, but Perlman refused to buy (Rec. 239). Perlman had already been

informed by Moore, also a government witness, that Miller had a carload of whiskey for sale (Rec. 241), but as this event occurred in July or August, it probably was a different carload.

On October 1st, Nicholas Ambrosi had been to his bank to obtain money to enable him to cash checks for people in his neighborhood, and, on his way home, which led him past Perlman's saloon, stopped there in order to go to the toilet. His friend, John Robinson, also a witness, was with him. Ambrosi bought a cigar and a glass of near beer and while standing at the bar was approached by Miller, who said that he had some whiskey to sell, and who showed him a paper with a long list of names on it of people who were getting the whiskey. Ambrosi refused to buy, and went on his way (Rec. 209, 210, 213-4).

About 3:00 P. M., that same day, the carload of whiskey arrived at Gresham station, 85th and Vincennes, Chicago, where the mysterious Berkson again appeared, but could not obtain possession of the whiskey because of lack of identification (Rec. 97). He finally persuaded Gorman, a co-defendant who was acquitted by the jury and who was acquainted with him, to identify him, which Gorman did (Rec. 97-8, 161). It was at first thought that the unfortunate Gindich was Berkson, and in fact he was identified as such by several witnesses, including the inevitable handwriting expert, but he was later dismissed by the government (Rec. 10) when other witnesses stated positively that it was a case of mistaken identity (Rec. 162, 100). The unloading of the car commenced about 7:30 P. M., under the direction of George F. Koeller, the station agent at Gresham, who was practically the sole unprejudiced witness of any importance produced in this case by the government (Rec. 98-9). A convoy of trucks appeared to haul away the liquor, and among those present at the unloading, in addition to Berkson, were

Mossy Joy, John Miller, Harry Frank, Louis Greengaard and others, minor characters, all government witnesses (Rec. 124, 114, 154). Most prominent among them, however, was Mossy Joy, who had theretofore engaged the government witness Greenwald to haul liquor for him (Rec. 139), telling him that he had a carload of liquor at 63rd Street, and that he had a permit to haul the stuff (Rec. 140-1). Parenthetically, this was not the first time that Greenwald had hauled whiskey for Joy (Rec. 141). Joy was quite intimate with Berkson and stood by some of the trucks, checking the cases as they were loaded (Rec. 223, 224, 225, 227, 228). During the unloading process Sergeant Judge, also a co-defendant, appeared upon the scene and was led away by a man who wore a diamond ring and a diamond pin (Rec. 98, 100), ornaments the subsequent loss of which was deeply mourned by Mossy Joy. Koeller, the government witness, and witnesses Galvin, a police officer, and Wissing, O'Hara and Lynch, railroad detectives, were at the car part or all of the time it was being unloaded, but not one of them saw either Heitler, Perlman or Greenberg there (Rec. 219, 221, 223-4). The caravan of trucks then started from Gresham station, and several of them, including the trucks owned by the Fitzpatricks, the Franks and by Joy and Miller met with disaster in the shape of highwaymen, said to have been led by Sergeant Smale, who held up the drivers and made off with the contents of the trucks (Rec. 124, 114-5, 155). Joy then started upon a tour of the city to find out what had become of his whiskey, and, in the course of his journey, stopped at several saloons (Rec. 146), finally arriving at the saloon of Perlman, where he found Perlman behind the bar attending to his duties and Heitler in one of the settees playing cards with two other men, where he had been since early in the evening (Rec. 238, 249, 265). Joy, who was con-

siderably inebriated (Rec. 148, 238) and more or less upset because of the recent disaster with which he had met, immediately accused Heitler of having held up his truck and robbed him of his whiskey, demanded his whiskey back or the money which he had paid for it, and threatened to "jam" Heitler if he did not get it (Rec. 239, 254, 257, 250). So far as Joy was concerned, the case would have ended then and there if he had been paid his price (Rec. 132-3). Joy finally became so noisy that Perlman put everybody out on the street and closed his place (Rec. 257, 238).

The next day, which was Saturday, October 2nd, Ambrosi, who had been down town to see Alderman Powers about getting a job for one of his friends, again stopped in Perlman's. Joy and Miller, drunk, were there also, arguing and saying that they had lost their diamonds, a carload of whiskey and everything else. Ambrosi asked what they were raving about, and Miller said "You are a pretty lucky man; we lost everything." Miller asked Ambrosi what he would do, and Ambrosi replied that if he knew who had taken it he would make them bring it back, otherwise he would fix them. Ambrosi then departed (Rec. 209, 212). Joy again asked Perlman what he was going to do about the liquor, and said that Heitler and Perlman knew who the policemen were who held them up, and that they had better get him his whiskey or money or they were going to go through with what they had said the night before (Rec. 239). Joy and Miller then went to the Elks' Club, where they continued talking and arguing in loud tones about whiskey and about having been held up. Mr. Trudel called Sergeant Shea in an attempt to assist Joy in getting track of his whiskey, but Joy was so noisy that Sergeant Shea refused to have anything to do with his case, and Trudel, for his kindness, was slapped by Joy hard enough to be thrown to the floor.

McCann, who was about twenty years older than Joy (Rec. 134), then received a smash in the face. Joy went after Quinn, age fifty, but he ran (Rec. 229-30, 259-60, 262, 126). Then Joy said to Miller, "Come on, get out of here before I kill somebody," and the two went out (Rec. 264).

The story of the whiskey robbery appeared in the Chicago Tribune on Sunday morning, October 3rd (Rec. 278), and a copy of the edition lay on Capt. Ryan's desk in the Englewood police station when he called Joy, Miller, Mickey Frank, Michael Heitler, Nathaniel Perlman and others to the station (Rec. 149). As soon as Joy saw Heitler at the station, he immediately broke out in a foul torrent of abuse, which was so vile that the trial court stopped him in his repetition of it (Rec. 126, 134, 197). Joy threatened to "jam" Heitler unless he got his whiskey or his money and said "I have reached the station—I have come here to the station and I am going to go clear through with the whole affair. You had a chance to stop me, but you did not stop me before I got here. I am going clear through with it now" (Rec. 197). Heitler told Capt. Ryan that they were trying to "job" him and asked Frank if he had seen him within the last two weeks, to which Frank replied that he had not (Rec. 197, 251). Statements were taken from Mickey Frank, Joy and Miller, and Joy exhorted Miller to talk, saying, "You know those Jews have got our whiskey, why don't you go ahead and talk" (Rec. 198). Mandel Greenberg was not called to the station, nor did he know, until the middle of November, that he was supposed to be a party to any conspiracy or whiskey robbery (Rec. 176).

The government then started to investigate the case and called Mossy Joy, Miller, Mickey and Harry Frank, Louis Greengaard, Michael Heitler, Nathaniel Perlman, Mandel Greenberg and Nicholas Ambrosi. Mossy Joy

did not see the government attorneys until his own attorney had said to him, "It looks bad, if I were you I would go down and come clean" (Rec. 133). Mickey and Harry Frank and Louis Greengaard, who had the same attorney, did not see the government attorneys, nor would they say a word until their own attorney, after three conferences with Assistant District Attorney Kelly, had told them to tell what they knew (Rec. 104, 116, 121).

When, however, Perlman, Greenberg and Ambrosi were called by the government, each immediately went to see the federal authorities without having consulted an attorney or without taking an attorney with them (Rec. 240, 176, 209-10).

A few days after the hearing at the Englewood station, Heitler telephoned his home about 3:00 P. M., according to his custom, to see if his little girl had gotten home from school. His wife told him that Major Dalrymple, the prohibition officer, was looking for him. He immediately went to see him and was asked to return, as Dalrymple wanted some men "to look him over." To this Heitler agreed. He returned and was "looked over," but he did not take a lawyer with him, nor did he see one, either before the first or the second visit. Among those who "looked him over" were the witnesses O'Hara and Wissing, both of whom then told Agent Callahan that Heitler had not been at the car that night (Rec. 224, 221). About ten days later, Heitler telephoned his home at the usual time, and was told by his wife that the district attorney wanted to see him. He immediately went to see Mr. Clyne and was held by the officials for about sixteen hours. He was then asked to return the next day with Perlman, which he did. But still he did not confer with a lawyer (Rec. 251, 252).

II.

The story as told on the witness stand by Mickey Frank, Harry Frank and Louis Greengaard.

According to Mickey Frank, Perlman and Heitler came to Frank's coffee shop, formerly a saloon, about September 15th, and offered to sell him one hundred cases of whiskey (Rec. 101), although Frank had not sent word to them that he wanted any whiskey (Rec. 105), had never had any business dealings with Heitler and had only bought glassware from Perlman, a couple of years before that (Rec. 105). The conversation was held across the bar, in ordinary tones, in the presence of five or six men (not produced as witnesses), who, remarkable to relate, did not inquire, after Heitler and Perlman left, where they could get any whiskey (Rec. 105-6). Neither Harry Frank, Louis Greengaard, nor one Kiser was present. Nothing was said about the price of whiskey, and Frank refused to buy because he could not handle so many cases. He did not try to find purchasers for the whiskey, nor did he talk to his brother Harry, nor to Greengaard or Kiser about it. In fact, he gave no further thought to the matter until about a week later, when Heitler and Perlman again appeared unsolicited at his coffee shop. The second conversation was also held across the bar in the presence of two or three men (not produced), but, as before, neither his brother, Greengaard nor Kiser were present. Heitler and Perlman offered the whiskey at $130 per case, and guaranteed protection from interference by city and federal authorities (Rec. 106). Frank thereupon gave them an order for one hundred cases, of which he, Harry Frank, Greengaard and Kiser were each to have twenty-five. Frank here repeatedly changed his previous testimony and said

that the fact was that Heitler and Perlman did mention the price at the first visit and that he, Mickey, did speak to his brother, Greengaard and Kiser before the second visit, and they agreed to take twenty-five cases each, which was the reason he changed his mind and bought the whiskey (Rec. 106-8). But Harry Frank contended that it was not until September 30th that he first heard about the whiskey deal (Rec. 116), and Greengaard said that he knew nothing of it until September 30th or October 1st (Rec. 119-20).

Mickey Frank said that on Friday, October 1st, between 9:30 and 10:00 A. M., before he heard from Perlman, he collected $3,250 from Kiser in the presence of Greengaard, who said nothing at the time, but who paid him a like sum half an hour later. He did not remember whether or not his brother Harry was present at that time. Mickey Frank then said that the fact was that Greengaard and Kiser did say something about the whiskey, and further stated, both that Greengaard had his money with him and that he did not have his money with him, but went and got it. Mickey also stated, both that Harry Frank paid him $3,250 after Kiser did and that Harry Frank did not pay him any money but that he, Mickey, drew it out of the bank himself. Upon further questioning, Mickey Frank stated that Kiser and Greengaard did not pay the money to him, Mickey, but paid it to his brother Harry, and, upon further questioning, the memory of Mickey Frank entirely deserted him, and he failed to remember anything about the transaction at all (Rec. 103-4, 112-3). According to Harry Frank, Greengaard and Kiser paid the money to him, and he thereupon drew his and Mickey's share from the bank, but he immediately changed his statement and said that it was Mickey who drew out the money (Rec. 116). Greengaard, a thirty

dollar a week waiter (Rec. 119), said that he got his $3,250 out of a safe deposit vault where he had kept it for a couple of years and paid it to Mickey Frank, and was not present when Kiser paid any money (Rec. 120). Mickey Frank said that Perlman called him up and told him to bring down the money, and that he thereupon gave his $13,000 to Harry and sent him down to Perlman's (Rec. 101), but it appears from the statement which Mickey Frank made to Capt. Ryan that Mickey first said that the sum was $13,500, and that it was paid on Thursday morning by Mickey to Perlman and Heitler (Rec. 111).

Harry Frank said that he and Greengaard arrived at Perlman's between 11:00 A. M. and 12:00 M., went into a booth with Perlman, paid him the money (Rec. 114) and did not get or ask for a receipt, although he had never before paid out so much money without getting a receipt. Greenberg was not present, but Heitler came in after the money was paid and Frank spoke to him (Rec. 117). Greengaard, however, who was with Harry Frank, did not hear Frank speak to Heitler, nor did he even see Heitler there, although he had known him by sight for a number of years (Rec. 120). Harry Frank and Greengaard thereupon returned to Frank's coffee shop, where, about 2:30 P. M., according to Mickey Frank, Perlman telephoned to Harry Frank (Rec. 102), while Harry was just as sure that it was Mickey whom Perlman called up (Rec. 114, 118). Mickey at first said that he thereupon ordered the truck to haul the liquor (Rec. 102), but thereafter said it was Harry who ordered the truck (Rec. 113). Harry, in turn, admitted at first that he got the truck (Rec. 117), but thereafter stated that it was Mickey who ordered the truck (Rec. 118). In any event, Harry Frank, Louis Greengaard and Kiser then went to the appointed rendezvous for the trucks

(Rec. 117). They first stopped at 61st and State Streets to meet Perlman, but he was not there. Harry Frank said that he saw Greenberg at 61st Street, but when asked to describe where he stood, changed his testimony and said that he did not see him at 61st Street, but was introduced to him by Greengaard at 63rd and State Streets, but no one was with him (Rec. 117). Greengaard, however, said that they first went to 63rd and State Streets where he saw and talked to Greenberg (Rec. 119). He did not, however, hear Harry Frank say anything to Greenberg, but he might have introduced the one to the other. Greengaard did not see Heitler at 63rd Street—it was Perlman whom he saw (Rec. 121). Later in the evening, Perlman told Frank and Greengaard to go to 79th and State Streets, and about 9:30 P. M. told them to go to 81st and Vincennes to get the whiskey, which they did. Harry Frank and Greengaard arrived at the car where they saw Heitler, Perlman and Greenberg around the car and the trucks, and Perlman told him to go and get his stuff. Harry at first said that he received one hundred cases, but immediately said that Greenberg, who had a piece of paper in his hand, called out that Mickey Frank was first with one hundred five—one hundred cases (Rec. 114). Frank took one hundred five cases, although he was only to get one hundred, and throughout the attempted explanation of the extra five cases displayed the usual change in testimony, first saying that Perlman had called him up about the five cases, and immediately asserting that it was Mickey to whom Perlman had spoken (Rec. 118). Greengaard was present, but he did not hear Greenberg say anything (Rec. 121).

Returning to the car after the holdup and loss of their liquor, Harry Frank saw Heitler, Perlman and Joy at the car (Rec. 115). He did not see Greenberg, nor were

there any trucks at the car at that time (Rec. 118). Greengaard, however, saw Greenberg at the car (Rec. 119). Heitler told Frank that if he had been held up by government men or policemen he would return the money and told Frank to see him the next day in Perlman's (Rec. 115).

The next day, Mickey Frank went to Perlman's saloon in the morning and saw Heitler, Perlman and Greenberg, who said they would return his money if he had been help up by government men or policemen; that they expected a carload of whiskey and would give him some (Rec. 102). This conversation took place on one of the settees (shown on defendant Perlman's exhibits 1, 2, 3 and 4, Rec. 211) and no attempt was made to lower their voices, although a crowd was in the saloon getting lunch (Rec. 113). Although Mickey Frank did not mention Greengaard as having been present, the latter said that he went to Perlman's with Mickey and saw Heitler, Perlman and Greenberg, but did not talk to them. He also said that Frank talked to Greenberg (Rec. 121), but this is denied by Mickey (Rec. 113). We call attention to the fact that Mickey said that when he went to see about getting his money, he went down about two steps into a saloon (Rec. 113). Of course, Perlman's place is right on a level with the street, but to enter Adolph Georg's place, which was Joy's hangout (Rec. 131, 147), it is necessary to descend a couple of steps (Rec. 131).

At 2:00 A. M., on the morning of Sunday, October 3rd, while Mickey Frank was in his coffee shop, waiting for his night man to appear (Rec. 104), he received a call from Capt. Ryan, requesting his presence at the Englewood police station. Frank arrived there before Heitler and Perlman and made his statement to Capt. Ryan, which appears at Rec. 111, and which his testimony at the

trial contradicts in important details. He said that Heitler came in, put his hand up to his throat and told him in Jewish to shut up, which Frank did and was thereupon locked up. This threat of death was made in a room 10 by 12 in the presence of Capt. Ryan, his secretary, and other police officers (Rec. 101, 104), but was not seen or heard by the secretary, who was within two feet of Heitler (Rec. 197). But Joy saw it (Rec. 134). Heitler and Frank were then put in the same cell without any remonstrance from Frank, and both left the station at the same time, but had no conversation (Rec. 101).

Mickey also testified that about a week after the hearing at Englewood, Heitler, Perlman and Greenberg came to his place, at 9:00 P. M.; that Heitler walked in, handed Frank $7,000, said that that was all he was going to get and walked out with Perlman and Greenberg (Rec. 102). Not a word was spoken by Frank, Perlman or Greenberg (Rec. 113). Harry Frank said that he saw Heitler, Perlman and Greenberg in his place in the evening a few days after the holdup and that they talked to him, but not about this deal (Rec. 115). He soon said, however, that Greenberg was not with them (Rec. 119). Mickey also said that about a week after he received the $7,000, Heitler and Perlman came to his place again and asked him if he had said anything to anyone, and he replied that he had not (Rec. 102). Then some government men came after Mickey and he got his lawyer, who went to see Mr. Kelly three times, after which Mickey was instructed by his lawyer to tell what he knew (Rec. 104). Greengaard and Harry went through the same performance, having the same lawyer (Rec. 116, 121).

III.

The story as told on the witness stand by Mossy Joy and John Miller.

On September 29th, Joy and Miller met one Moore, who, having reason to believe that they would purchase liquor (Rec. 271), took them to "Heitler, Perlman and Greenberg's place at the corner of Fifth Avenue and Washington Street," in Chicago, where he said they could buy whiskey (Rec. 123). Parenthetically, Moore was formerly engaged in the oil operating business, and, at the time of the trial, was engaged in selling the bonds of the Missoula Placer Mining Company, of Missoula, Montana, a Delaware corporation, the owner of a mine which "has been worked" (Rec. 271). According to Joy, they then purchased the whiskey, and Heitler told them that he expected a carload every week, that he had just borrowed $35,000 from Senator Broderick and $15,000 from Nicholas Hunt (Rec. 123). Miller, who was present, failed to hear any reference to Senator Broderick or to Mr. Hunt (Rec. 149).

The next day, Joy and Miller returned to Perlman's saloon at 7:00 P. M., and gave Perlman, Heitler and Greenberg $10,824 for eighty-two cases at $132 per case, and were told by Heitler to return the next day when they would be told when and where they could get the whiskey (Rec. 124). After narrating at length how the money was paid to Greenberg, who tried five times to count it, Joy conceded that he did not know whether or not Greenberg was present (Rec. 137). Joy then took his departure and returned about 9:30 P. M., when he failed to see Perlman, but did see two or three bartenders (Rec. 137), although Perlman only employed one (Rec. 235).

On Friday, October 1st, according to the story of these

two gentlemen, they met Ambrosi at the Elks' Club, about 1:00 P. M., and the three of them then went to Perlman's and paid Ambrosi's money, $2,780, to Heitler, Perlman and Greenberg (Rec. 124). Joy said that Ambrosi gave the money to Miller, who gave it to Perlman (Rec. 137, 138). Miller agrees that the money eventually got to the hands of Perlman, but said that Ambrosi gave the money directly to Perlman (Rec. 150). In any event, Ambrosi received a receipt for his money, not from Heitler, Perlman or Greenberg, but from Joy and Miller (Rec. 124, 137, 144). Then Joy made arrangements with Greenwald to meet him, and he and Miller went to 61st and Wentworth Avenue where they met the truck. According to Joy, he remained with the truck until 5:00 or 6:00 P. M., when he went to 63rd and State Streets where, about 8:30 P. M., he met Miller, Heitler, Perlman and Greenberg (Rec. 124). But Greenwald, also a government witness, testified that Joy met the truck, but immediately went off and was not seen again for several hours (Rec. 139). Miller's story was that he and Joy went to 61st and Wentworth Avenue where Joy remained with the truck while he, Miller, went to 63rd Street where he saw Heitler, Perlman and Greenberg, gave Heitler a check for some more whiskey and overheard a conversation between Heitler and Greenberg about the difficulty in locating the car. He was instructed by Perlman to go to 82d and Vincennes, where Joy took the truck over to be loaded (Rec. 144). Miller saw Heitler's machine at 82d and Vincennes (Rec. 144), but was unable to state on the witness stand what make of car it was, although the car was a Hudson, and Miller had been and was a dealer in automobiles, could distinguish a Hudson from other cars, and was quite familiar with all makes of automobiles (Rec. 150). Joy testified that he saw Heitler, Perlman and Greenberg at the car at Gresham Station, and, while they were talking, eight or nine policemen

came up with drawn revolvers and some one told Heitler to "take care of them." Heitler then led away Sergeant Judge and upon his return said that he had given Judge $1,000 (Rec. 124). Koeller, on direct examination, said, however, that when the fifth truck was at the car, a police officer, Judge, came up and was led away by a man who had a diamond pin in his tie and a diamond ring on his finger (Rec. 98) and Lynch testified that Heitler was not at the car nor could he have been there without being seen by him, Lynch (Rec. 228).

Joy and Miller left the car with the truck-load of whiskey and were held up, Joy in addition to losing his liquor, losing his diamond pin and diamond ring (Rec. 124, 144, 145). Joy said that he then returned to the car and saw Heitler. While they were talking, Frank came up and "started to put on a war dance" about being held up (Rec. 125). Joy was also "hollering" about the holdup (Rec. 115). No "hollering" or "war dance" about holdups was mentioned by Koeller (Rec. 97-100), nor was any such disturbance heard by Wissing (Rec. 222), O'Hara (Rec. 223-4) or Lynch (Rec. 227). Heitler then said for them to meet him at "my saloon." According to Joy and Miller, after leaving the car, they stopped at several saloons, among which was the saloon of Callaghan, a co-defendant, where Joy introduced himself as the man who was getting the whiskey. They finally arrived at Perlman's and waited there until Heitler, Perlman and Greenberg came in, about an hour later. Heitler told Joy to wait until the next day and he would find out who had taken the whiskey—if it was policemen he would give Joy back his money. Heitler, Perlman, Greenberg, Joy and others then got into a machine and looked for the whiskey out on the South side (Rec. 125, 145). Hans, a co-defendant, who was supposed to have been along on this trip, offered a complete alibi which

we have not set forth, as he was acquitted by the jury (Rec. 202-5, 207-8, 215-18).

On October 2d, Miller called for Joy, who suggested going to Perlman's, which they did. Joy saw Heitler, Perlman and Greenberg in the saloon between 1:00 and 2:00 P. M. and asked Heitler what he was going to do about the money. Heitler turned over a check, saying that he had been to the bank and that payment had been stopped, that he was not going to give back any money (Rec. 125, 145). Ambrosi was there also, and threatened to kill Heitler, Perlman, Greenberg, Joy and Miller if he did not get his money back (Rec. 146). Miller said that he gave Ambrosi back every dime of his money (Rec. 146), but later denied giving him back any money (Rec. 150), while Joy said that Heitler gave back seventy-five per cent and Miller gave back twenty-five per cent (Rec. 138).

According to Miller, he and Joy then went to the Elks' Club where he saw McCann and Quinn, who now appear upon the scene for the first time. A man named Caruso, whom he had seen at Perlman's, came for Joy twice, and Joy went to Perlman's twice, returning each time to the Elks' Club. Joy told Miller that McCann and Trudel had been interfering with the conversation in Perlman's, but that he had agreed to let the whole matter go over until Monday, and that he was of the opinion that he would get his money back as Perlman thought they were entitled to it, and that he, Joy, had the telephone numbers of Heitler and Perlman (Rec. 145-6, 148). The story told by Joy is that he and Miller went to the Elks' Club, where he announced his unwillingnes to "holler." Heitler sent for him and told him to wait until Monday, that he thought he could pay Joy fifty per cent in money and fifty per cent in goods, as he had a car coming in next week. Then McCann, Quinn and Trudel came in and disturbed the argument, demanding commissions from

Heitler for the sale of Grand Dad whiskey. Joy finally told McCann that he would pay his commission himself, if McCann would leave him alone and give him a chance to get his $20,000 back. Joy returned to the Elks' Club and Caruso came for him again, whereupon he returned to Perlman's and Heitler, Perlman and Greenberg asked him if he had said anything to anybody, and he replied that he had not. McCann then came over and again Joy threatened to punch him, and did shove him away. Heitler then said to wait until Monday, to which Joy agreed, and went back to Elks' Club. Caruso came for him again, and again he went to Perlman's. This time, Perlman gave him his own and Heitler's telephone numbers and said for Joy to call them up if anything happened during the night, as Joy would get fifty per cent of his money back and the other fifty per cent in goods from the carload coming in Wednesday or Thursday. Joy replied "fine and dandy," and returned to the Elks' Club (Rec. 125-6), but neglected to inform Miller of this alleged arrangement for the return of their money (Rec. 149).

According to the stories told by these two, when Capt. Ryan telephoned to Miller, the latter called up Joy and insisted on Joy's going to the station also (Rec. 148). (As a matter of fact, Miller displayed a mere academic interest in the loss of his money, leaving all details as to recovery to the redoubtable Joy (Rec. 148, 149)). Joy at first refused to go, because he was satisfied with the arrangement for repayment which he had made with Heitler, Perlman and Greenberg and expected to get his money, but, nevertheless, finally consented to go, which he did without telephoning to either Heitler or Perlman (Rec. 128, 139). Immediately upon Joy's arrival at the station and without Heitler's having said that he was going back on his alleged arrangement, Joy began addressing to Heitler such vile language that he was stopped by the court in its repetition (Rec. 126, 134). The story

had appeared with large headlines in the Chicago Tribune, which Capt. Ryan had in front of him. Miller asked Joy how the story got in the paper and talked with Dougherty and Lingle, Tribune reporters, who were present. Lingle did not say that he had been to Joy's house, but Dougherty told him how he got the story (Rec. 149). Joy, however, did not remember that the story was in the paper, but, in the same breath, said that Quinn gave it out (Rec. 133).

Joy testified that, a few days later, Heitler called him up and said that he would pay fifty per cent of the money to the saloonkeepers, but that he would not pay Joy or Miller anything, and that Joy and Miller would have to leave town, to which Joy agreed (Rec. 127), notwithstanding the fact that the only reason he testified in the case was because he lost his money and notwithstanding the further fact that he would have taken it at any time from anyone and remained silent (Rec. 132-3). To corroborate his statement, and after the case got to the point where Joy admitted that he had to produce witnesses to protect himself, Joy produced Edward Todd as a witness in rebuttal, who testified that Joy called him up the day after he read about the whiskey robbery (probably Monday) and told him to go to a pool-room at Chicago and Paulina Avenues and meet him there. Joy did not appear, but "the men called Perlman and Mike" appeared and offered him a piece of paper which they said was a check, but which Todd refused to accept, saying that he had dealt with Joy. That night, Todd received an envelope containing $1,200 in cash, and called up Joy who told him that he would see that he got the rest. The next day Todd received $750. Todd did not, however, offer to identify Perlman and Heitler as "the men called Perlman and Mike" (Rec. 273-4).

Joy said that Lingle, the reporter, was not present at any interview which he had with Messrs. Clyne and

Kelly, the government attorneys, and that he did not meet Messrs. Clyne, Kelly and Lingle at the Union League Club (Rec. 133). Thereafter, he resumed the stand with a show of frankness and said that he had found out that he had been to the Union League Club and had then requested Assistant District Attorney Kelly to recall him to the stand in order that he might correct his testimony, but, in the next breath he had to admit that it was Mr. Kelly who had called him, told him that he was wrong, and told him to come back and correct his testimony. Joy then admitted that Lingle had been present at this interview (Rec. 143). Miller's story was that Lingle came to him and Joy and said that he wanted to take them to the government attorneys, and that they both agreed, and that thereupon Lingle took both Joy and him to see the government attorneys (Rec. 147).

IV.

Certain alibis offered by the defendants.

The defendants not only denied specifically all alleged facts implicating them in the whiskey handled by the government witnesses, but as to some alleged events, offered a complete alibi, testified to by witnesses whom no attempt was made to impeach. For instance, Joy and Miller testified that they saw Mandel Greenberg in Perlman's place on Thursday, September 30th, between 7:00 and 8:00 P. M. (Rec. 124, 136, 143-4, 149-50). It was clearly shown, however, that about 9:00 A. M. of this day, Greenberg reached the office of Wacker & Birk Brewery (Rec. 172), where he had worked for about thirteen years (Rec. 163, 165). According to the custom of the brewery, every member of the office or selling force must remain at the brewery all day on the last day of each month, their supper being served to them in the office (Rec. 165, 166-7).

Greenberg remained at the office, except for the lunch hour, until about 8:00 P. M. and during all of this time, he was at least thirty minutes ride from Perlman's saloon (Rec. 172). He helped the colored waiter set out the supper (Rec. 185-6) and during the meal took part in a discussion about a new beverage which the company was about to sell (Rec. 184). About 8:00 P. M., Greenberg and Mr. Kirchstein left the brewery together and took the elevated south to 51st Street, where Greenberg got off (Rec. 165), went straight to his hotel, where he remained the rest of the night (Rec. 175).

Joy and Miller also testified that they saw Greenberg in Perlman's place about 1:00 P. M. on Friday, October 1st (Rec. 138, 144) and Miller testified that he saw Greenberg at 63d and State Streets continuously from 3:00 to 7:00 P. M., except, perhaps for a few moments (Rec. 144, 150). Greengaard and Harry Frank also testified that they saw Greenberg at 63d and State Streets about 3 P. M. (Rec. 117, 121). Harry Frank, Greengaard, Joy and Miller all testified that they saw Greenberg at the car at Gresham Station while the car was being unloaded (Rec. 124, 138, 145, 118, 119), which was between 7:15 P. M. (Rec. 98) and 9:50 P. M. (Rec. 99). Joy and Miller also testified that they saw Greenberg in Perlman's after the car had been unloaded and after the holdup (Rec. 125, 145).

It was clearly shown, however, that on Friday, October 1st, Greenberg left his hotel at 50th Street and Michigan Avenue, about 11:15 A. M., together with his nephew Benjamin Rodkin, and went to 4737 St. Lawrence Avenue, the flat from which he had just moved. Some furniture had been left in the flat (Rec. 195) and the purchasers had come for it. Greenberg stayed in the flat until about 3:00 P. M., when one Bernstein came and got a rowing machine. Greenberg and Bernstein then went across the

alley to 4750 Champlain Avenue, where Greenberg had left some pulleys to an exercising machine when he moved, on October 1, 1919, from Champlain to St. Lawrence Avenue (Rec. 181). Greenberg got the pulleys and gave them to Bernstein (Rec. 201). About 3:15 P. M., Greenberg turned in the keys to his flat (Rec. 182) and went to his nephew's, Rodkin's, house and left some groceries. He then stopped at Mrs. Goldman's, where he also left some things (Rec. 183). He next went to his sister's, Mrs. Rodkin's, and arrived just at the time when she was lighting her candles, according to the orthodox Jewish custom, it being about sunset (Rec. 196, 200). He next stopped at a store of the Wahlgren Drug & Chemical Company, in which he was at that time financially interested. Rodkin then drove him to the hotel and left him there about 6:00 P. M. Greenberg had dinner with his family at the hotel, which is about a mile and a half from 63d and State Streets (Rec. 189), and was seen by the witness Lyons, the hotel keeper, who noticed his presence because it was the first time he had seen Greenberg (Rec. 188). Between 7:30 and 8:00 P. M., Rodkin and the witness Stone entered the lobby and inquired for Mr. Greenberg, Rodkin having previously met Stone in front of Garber's on 61st Street (Mr. Garber, who was introduced in rebuttal by the government, did not remember seeing Stone on October 1st, but admitted that Stone might have been there without his knowing it (Rec. 266)). Lyons thereupon called Greenberg, who came out of the sitting room and met Rodkin and Stone. The latter three then went upstairs to Greenberg's apartment, where they remained for about half an hour, when Greenberg, his daughter Lillian, Stone and Rodkin left the hotel and went to the moving picture show at the New Park Theatre on 51st Street, where they remained until about 10:30 P. M. (Rec. 186-7, 199), at which time Green-

berg and Lillian left Stone and Rodkin and went home, stopping at a fruit store on the way (Rec. 173-5, 206-7).

Harry Frank and Greengaard testified that they saw Perlman at 79th and State Streets at 9:00 and at 9:30 P. M., on Friday, October 1st (Rec. 114, 119). Joy and Miller testified that they saw Perlman at 63d and State Streets at various times in the afternoon and later saw him at the car while it was being unloaded (Rec. 124, 145), and they further testified that they saw Heitler at 63d and State Streets and later on saw him at Gresham Station about the car (Rec. 124, 144, 145). Perlman testified that he arrived at his place at the usual time, about 11:00 A. M., and stayed there until midnight (Rec. 242), and that he paid his rent to the agent of the building between 5:30 and 6:00 P. M. (Rec. 239). Heitler testified that he left his home about 10:30 A. M. and went down town. He went to see Mr. Schar (who owned a factory at 1814 West Harrison Street and who at the time of the trial had had a stroke of paralysis) from about 3:15 to 5:15 P. M. Thereafter he went to the office of Mr. Cohen, his attorney, and then to supper (Rec. 249). Heitler's chauffeur met him about 7:30 P. M. and took him to Perlman's (Rec. 257), where he saw Perlman behind the bar (Rec. 249). Shortly thereafter, Messrs. Cohen, Feldman and Hoffman came in and remained to play cards with Heitler until Joy and Miller came in, about 11:00 P. M., and accused Heitler of having "been in on" the holdup and of taking their whiskey (Rec. 257, 265). After Perlman had closed up the place, Heitler drove away in his machine with Messrs. Cohen, Feldman and Hoffman (Rec. 250, 265).

HEITLER *v.* UNITED STATES.

PERLMAN *v.* UNITED STATES.

GREENBERG *v.* UNITED STATES.

McCANN *v.* UNITED STATES.

QUINN *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 185–189. Motion to transfer to Circuit Court of Appeals submitted December 11, 1922.—Decided January 2, 1923.

1. Under the Act of September 14, 1922, c. 305, 42 Stat. 837, a case brought here from the District Court upon the mistaken assumption that it presents a substantial constitutional question, but which involves other questions within the jurisdiction of the Circuit Court of Appeals, should be transferred to that court. P. 439.
2. This statute should be construed liberally. P. 440.

Cases transferred.

APPLICATIONS to transfer these cases, heretofore dismissed for want of jurisdiction (*post*, 703), to the Circuit Court of Appeals. For the opinion of the District Court, see 274 Fed. 401.

Mr. Weymouth Kirkland and *Mr. Robert N. Golding*, for plaintiffs in error, in support of the motion.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

These were writs of error issued directly to the District Court under § 238 of the Judicial Code to review sentences of fine and imprisonment on the ground that they were cases in which the constitutionality of the National Prohibition Act, under which the convictions were had, was drawn in question. In addition to the constitutionality of the Prohibition Act, the assignments of error raised many questions as to the admissions of evidence and the charge of the court. We held that in view of our previous decision affirming the validity of the National Prohibition Act (*National Prohibition Cases*, 253 U. S. 350), the plaintiffs in error were precluded from raising the question again and basing thereon a claim of jurisdiction for a writ of error under § 238, that the question made was, therefore, not substantial but frivolous, and that the writ should be dismissed for want of jurisdiction on the authority of *Sugarman* v. *United States*, 249 U. S. 182, 184, and cases cited. *Heitler* v. *United States, post*, 703. This conclusion made it impossible for us to consider the other errors assigned.

The plaintiffs in error now invite our attention to an Act of Congress approved September 14, 1922, c. 305, 42 Stat. 837, adding § 238 (a) to the Judicial Code, which provides that " . . . if an appeal or writ or error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of, a circuit court of appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force

and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

This is a remedial statute and should be construed liberally to carry out the evident purpose of Congress. The fact that the opportunity therein given to litigants in the Circuit Courts of Appeals where they have mistakenly sought a review in this Court may at times be abused and unduly prolong the litigation and delay the successful party below, is no reason why when the case comes clearly within the language of the statute the transfer should not be made. The successful party below may avoid undue delay by a prompt motion to dismiss in this Court in such cases.

The cases before us are clearly within the remedy of the statute. Based on the assumption of the presence of a real constitutional question in the case, plaintiffs in error sought review here not only of that question but of the numerous other errors assigned in the record. *Williamson* v. *United States*, 207 U. S. 425, 432, 434; *Goldman* v. *United States*, 245 U. S. 474, 476. We find that there is no constitutional question of sufficient substance to give us jurisdiction to consider these other errors. In other words, we find that to have such alleged errors considered and reviewed, the writ of error herein should have issued out of the Circuit Court of Appeals of the proper circuit. Accordingly we hold that these several cases should be transferred to the Circuit Court of Appeals of the Seventh Circuit at the costs of the respective plaintiffs in error, that that court be thereupon possessed of the jurisdiction of the same and proceed to the determination of said writs of error as if such writs had issued out of such court.

And it is so ordered.